#39030513
ID58048688
HC
110
.E5
N374
1997

ALTERNATIVE DISPUTE RESOLUTION STRATEGIC PLAN

"Discourage litigation, persuade your neighbor
to compromise where you can. Point out
to them how the nominal winner is often a
real loser....in fees, expenses, and waste of time."
Abraham Lincoln, 1851

Bureau of Land Management
Washington, D.C.
1997

STRATEGIC PLAN
NATURAL RESOURCE ALTERNATIVE DISPUTE RESOLUTION INITIATIVE
Bureau of Land Management

INTRODUCTION

Natural resource and land management, environmental policy, and administrative management are marred by frequent conflicts. Traditionally these conflicts either have been ignored or, resolved, or stalled through expensive and often lengthy litigation. Cumbersome adversarial processes frequently leave few stakeholders truly satisfied. The high costs of litigation divert capital from more productive functions. Parties who have monetary resources and strong legal expertise have been able to extend and "ride out" court delays, giving these parties an advantage in negotiations. Courts are inadequate forums for effectively solving all problems because, even though decisions rendered may settle a particular conflict or establish a point of law, the problems that created the conflict often continue to exist.

It is the decision of the Bureau of Land Management (BLM) to establish a program for incorporating alternative dispute Resolution (ADR) into its land management practices. In the spirit of collaboration and partnership building, it is BLM's goal to incorporate and improve upon existing ADR techniques to create more communicative and cooperative, and less adversarial partnerships in our public and land user relationships. We want to emphasize the "win-win" methods and procedures of ADR in building long-term relationships among other federal, local and private entities. Disputants always have the option of taking the dispute back through the established administrative or litigation processes in the event they are not satisfied with the ADR outcome.

AUTHORITY

Under federal law, the primary ADR authorities include: (1) Public Law 104-320, the Administrative Dispute Resolution Act of 1996; (2) Executive Order 12778, Civil Justice Reform, October 23, 1991; (3) Executive Order 12871, Labor-Management Partnerships, October 1, 1993; (4) Public Law 104-320, the Negotiated Rulemaking Act of 1996; (5) the Report of the National Performance Review, September 7, 1993; (6) implied authority contained in the responsibilities of managers in the executive branch to consider the views of affected parties, such as Section 103 (d) of the Federal Land Policy and Management Act, 1976; and (7) guidance from the Department of Justice Civil Division on the use of ADR in place of litigation in federal courts; trial is the final option.

BLM's RESPONSE

The BLM created a nationwide natural resource ADR Initiative Team in March 1996, in response to a March 8, 1996 memorandum from Director Dombeck to the Executive Leadership Team (ELT). This memorandum requested each member of BLM's Executive Leadership Team (ELT) to designate a manager or senior staff person to participate as a national core team member for the purpose of advancing natural resource ADR initiatives and developing national policy and operating guidelines.

The nationwide ADR team created was composed of BLM employees from state and field offices, the Washington Office (WO) and an intern in Communications and ADR from the University of Denver. The purpose of forming this team was to provide the design and foundation for this program. The following vision and policy statements were created by the team to set the direction:

Vision Statement

The BLM (people, workforce, organization, and culture) will value resolving issues and disputes through alternative dispute resolution philosophies and processes (alternative dispute resolution) rather than through confrontation, appeals, or litigation.

Success of this effort will be demonstrated by an increase in customer trust and a significant increase in resolving conflicts prior to appeals or formal litigation. However, BLM recognizes that appeals and litigation may be necessary to establish case law and resolve ambiguities in the law.

Policy Statement

The BLM recognizes the benefits of utilizing alternative dispute philosophies and processes (alternative dispute resolution [ADR]) to build trust relationships between the public and the BLM and to reduce the cost of conflict resolution. Therefore, the BLM will use alternative dispute philosophies and processes, when appropriate, in handling issues and disputes. Every BLM regulation will contain a requirement to provide for the use of ADR procedures.

The Natural Resource ADR Initiative team will sunset when this plan is approved and published. Responsibility for the successful implementation and completion of the plan will lay with the ELT who will be assisted by a steering committee and ADR consultants who are to be appointed in each office. Their goals and responsibilities will be discussed later in this document.

BLM's DEFINITION OF ADR

BLM defines ADR as a variety of ADR problem solving processes used in lieu of traditional dispute resolution procedures. The primary goal of each of these techniques is to maximize all parties' joint gains. These joint problem-solving techniques as described in Section D, Glossary of ADRTerms in the ADR Tool Kit, usually include the use of a neutral third party; are often voluntary; and are intended to enhance communication among disputing parties. ADR techniques offer the possibility of developing creative solutions to conflicts and more sensible and practical outcomes that may not be available in litigation and formal administrative procedures.

RESPONSIBLE PARTIES

Responsibility for successfully implementing ADR processes and procedures is broad. Every employee must be encouraged to resolve conflict prior to litigation through the use of ADR and common sense communication with our stakeholders. Nationwide responsibility for ensuring the success of this initiative falls upon the shoulders of the ADR Steering Committee. It is recommended that the Steering Committee be composed of one representative from each of the following: the ELT, Field Committee, and National Training Center (NTC). In addition one or more ADR consultants who are to be designated for each state, center, and WO division. Also included would be the Bureau's Natural Resource ADR Program Leader. Other individuals may be added as needed.

An ADR consultant be appointed by each state, center, and WO division. ADR consultants are collateral duty or full time employees who are or will be trained in depth in ADR concepts, processes, and procedures. The consultant will be responsible for assisting managers and staff in recognizing situations appropriate for the use of ADR, and, when appropriate, coordinating the use of third party neutrals to assist in resolving the conflict. The consultant also will provide assistance and training opportunities for continued ADR skill development for all employees. If an office elects to appoint an ombudsman, the ADR consultant may also be assigned this role. See Appendix II, List of Knowledge, Skills, and Abilities for an ADR Consultant, which may be used as a guide to select a consultant for each office.

PLANNING PROCESS

In order for this initiative to be successful, careful planning for program implementation is necessary. Three paths must be followed simultaneously to ensure success. The paths include: training, marketing, and monitoring and evaluation. Listed below are the goals to be achieved for each arena and a discussion of the key steps towards success.

MARKETING

To market this program successfully, internal and external marketing strategies must be developed. Our internal and external customers must see this approach as a plausible alternative to litigation and an early step for conflict resolution. To accomplish this mission, Appendix A:, Marketing Plan, details various actions that must occur. The primary goals of this marketing plan are:

1. Identify various internal and external customers who would be willing participants in pilot partnership initiatives. From these early experiences, BLM can learn from mistakes and successes and market the results.

2. Identify and continuously market ADR tools and techniques that can be used in the BLM arena.

3. Identify a variety of creative funding sources for this initiative.

Marketing will also be a continuous process. This plan addresses the immediate marketing needs of this program. As BLM
addresses new challenges in the ADR arena, a continuous marketing strategy will need to be developed by the ADR Steering Committee.

TRAINING

Training is an essential component for implementing change within an organization. Therefore, the ADR Team recommends an ambitious training schedule. See Appendix B: Training Plan for a detailed description. When the training is complete the following goals will be achieved:

1. All employees of the BLM will be familiar with the tools and techniques used in ADR and will be able to identify how these tools and techniques apply to their every day work environment.

2. All managers and appropriate staff members will have the skill and knowledge to use and participate actively in ADR processes, and be able to identify their changing roles in this process.

3. All ADR consultants will have the skills necessary to carry out their responsibilities as ADR consultants within the Bureau.

4. Appropriate employees will develop the skills necessary to mediate conflicts as deemed appropriate.

5. Courses taught at the NTC will incorporate ADR concepts, practices and skills when appropriate within the curriculum.

Although the training plan appears to be ambitious, it is only the first step in institutionalizing the ADR concepts within the BLM. As the program progresses, additional training concerns will be identified and addressed by the ADR consultants and the ADR Steering Committee.

MONITORING AND EVALUATION

In order to see if the actions addressed above have been successful, a monitoring and evaluation plan has been developed. See Appendix C: Monitoring and Evaluation Plan. The goals of this plan center around data collection and analysis and are:

1. Establishment of baseline data in order to measure where BLM is today in terms of conflict resolution.

2. Development of data indicators to determine if the BLM culture is changing in the way it resolves conflict.

3. Development of indicators that will measure the usage of ADR tools and techniques throughout the Bureau.

These monitoring and evaluation tools are necessary to measure BLM's success but will also be used as indicators of where BLM will need to focus in the future. Based on future analyses, the training and marketing plans may need to be adjusted.

IMPLEMENTATION OF THE PLAN

Initially, there are numerous activities associated with the implementation of this plan. The following actions must occur within the first 90 days after the Director's approval of this plan:

* Transmission of the Director's ADR Instructional Memorandum
* Appoint and convene the ADR Steering Committee
* Appoint ADR consultants for state, centers and WO divisions
* Begin to execute early steps in the training plan
* Begin to execute early steps in the marketing plan
* Establish baseline data for monitoring and evaluating program success

CONCLUSION

Changing the culture within the BLM on how to settle disputes will not be an easy process; however, there is evidence that we are beginning to select alternative methods of decision making through collaborative decision making processes. We are becoming more aware of the importance of building and maintaining healthy relationships with our internal and external customers. Building relationships based on trust and respect is the foundation for resolving disputes through alternative means.

This next important phase in changing our culture must be viewed in small steps. BLM will need to establish carefully this ADR program to ensure success of the effort, and to be brave enough to make mistakes and learn from them.

_ (s) Pat Shea_____ _9/11/1997__
Approved Director Date

Appendix A: MARKETING Plan
Natural Resource Alternative Dispute Resolution (ADR) Plan

Introduction.

BLM historically has used ADR as a means to resolve differences internally, particularly related to Equal Employment Opportunity (EEO) complaints. Recently, increasing emphasis has been placed on ADR as a preventive measure for such grievances and complaints. However, significant conflicts and confrontations also arise as a result of the BLM's complex, multiple-use mission.

It is the intent of this marketing component to identify opportunities to apply ADR to resource concerns and problems. Examples when ADR might be used are: in the wild horse & burro program (i.e., setting appropriate management levels through group discussions and the allotment evaluation process); the range program (i.e., implementation of Standards & Guidelines for Healthy Rangelands, and allotment evaluations); the lands program (i.e.. resolving trespass issues): the solid minerals program (i.e., developing mitigation measures for controversial mining projects); the recreation program (i.e., resolving various conflicts among diverse recreation users of Public Lands such as mountain bikers, hikers, off road vehicle users, rafters, fishermen, hunters, and climbers), the land-use planning and NEPA processes (i.e., resolving conflicts among various constituencies over use and to protect Public Land resources; and providing for appropriate assessment and mitigation measures); and the wilderness program (i.e., working with conservation organizations and industry interests to identify wilderness values).

For a more detailed description of possible ADR applications in the BLM, by program, see appendix 1 in this section, prepared by Washington Office in January 1995. Appendix 1 is a report entitled "Alternative Dispute Resolution Program Plan - Survey of Potential Applications for Alternative Dispute Resolution (ADR) Methods in the Bureau of Land Management."

Benefits of ADR.

Some of the many benefits of using ADR include the following:

1. Better relationships and improved communications are established among employees and customers through demonstrated openness and inclusiveness of all constituents.

2. Opportunities are created for a wider range of creative solutions and possible options in resolving disputes. Decisions can be reached faster, more efficiently, more sensibly, and less contentiously

3. Costs associated with administrative appeals and litigation are reduced, as are the amount of time and disruption involved in resolving disputes. Current administrative systems are: too formal, costly, and lengthy; involve unnecessary expenditures of time; and result in a decreased likelihood of dispute resolution.

4. Ambiguities under existing law are alleviated by providing explicit authorization through the

use of ADR processes. Such applications have been proven successful in the private sector as well.

In summary, then, the benefits of using ADR techniques include:

Improved relationships, better decisions, a better climate for resolution, expedited procedures, reduced costs, enhanced flexibility, more control over the outcome, control by people who best know the needs of the organization, and an increased probability that decisions will hold up.

The Challenge.

BLM faces incredible challenges in trying to manage the Public Lands as good stewards and trustees for current and future Americans in a world of rapidly changing technologies, economics, politics and overall conflicting public priorities. Moreover, the location of most of its lands and resources in the Western region of the U.S. is characterized by rapid population growth, increasing competition for resources, concerns over states' rights and county supremacy, and ever increasing public involvement in land management decisions.

Because of this external environment in which the BLM finds itself, the internal challenges of declining budgets and staffing, and changing priorities, the use of ADR techniques seems almost essential. We must come up with ways to move ADR forward in BLM - **to institutionalize it** - so that it becomes an accepted way of doing business. Such a change in organizational behavior or culture must "start at the top," by senior Bureau managers setting the example by using ADR processes in their management approaches.

One outcome will be more effective public decisionmaking, which will require ADR to be marketed to external customers as well as internal BLM employees. Another desired outcome could be that the BLM will be viewed by our customers, stakeholders, and partners alike as an agency of service-oriented employees who are willing to listen to other people's viewpoints before making a decision.

Several initiatives are identified in the Strategic Plan to encourage greater use of ADR techniques. They include discussions of: training, marketing, implementation, support; and transition, and short-term and long-term evaluation and monitoring.

The Marketing Process.

Marketing is a process that ensures desired products and services are developed and delivered to specific customer groups (target markets) in a timely fashion and meets the customers' technical specifications, quality standards, and financial requirements. The process encompasses more than just the buying and selling of merchandise, although that is the end result.

Marketing is said to be composed of the "4 P's":
Product,
Price,
Place,
and
Promotion.

These four variables are manipulated to meet the needs of the particular target market in delivering a total product package. Often times, there is not necessarily a direct relationship between the costs of producing a particular product or providing a certain service and the price of the particular item.

Price is more often determined by the targeted market segment's "willingness to pay" and the competition. For example, the "price" of Federal Oil and Gas or Coal Lease Tracts offered for sale by BLM is determined by how much energy companies are willing to bid to obtain the lease.

Place or how a product or service is distributed to customers varies as well. The grazing industry and wildlife organizations are excellent examples of how healthy public rangelands not only benefit ecosystems, but also provide the "place" for critical food and habitat for domestic animals and wildlife. Public rangelands play an important role in America's food supply by providing beef, veal, and lamb, as well as providing opportunities for recreational hunting and fishing.

Products vary as well, based on the need to appeal to specific market segments. The forest products industry illustrates the wide variety of lumber, wood, and paper products that result from BLM timber and woodland sales. Products range from lumber and plywood for homes,, wood for furniture, Christmas trees, firewood, and to newsprint for papers and magazines.

Promotion does not mean just advertising, or public relations, or point-of-contact (in-store) displays or direct mailings. Promotion includes using various media - whether it is TV, radio, magazine, newspaper, or billboards - to deliver a consistent message about a particular product to identified market segments to inform, create excitement, and influence a buying decisions. The leisure, recreation, and tourism industry is a good illustration of how various media are used to promote specific trip destinations and tourism attractions on BLM-administered Public Lands.

Marketing ADR to BLM.

The following "marketing outline" has been developed to help answer the question, "How do we 'market' ADR to the Bureau?" In other words, how can we encourage greater use of ADR techniques throughout the Bureau and by external customers?

1. Identify the various target groups or market segments (customers) to whom BLM will try to promote the use of ADR, both inside and outside the Bureau.

2. Identify the various ADR approaches (products) that might work best for specific groups and situations.

3. Describe financial and other benefits (promotion) when selected groups use specific ADR methods.

4. Identify creative funding sources (price) for underwriting the costs of ADR, such as partnerships and grants.

5. Define an implementation schedule, performance measures, and an action plan for delivering ADR to the BLM (place).

6. Include examples of ADR success stories (reinforce marketing message).

The Target Groups for ADR (Internal/External)

Internal:

The primary target groups within the BLM for marketing ADR are the Field Managers and senior staff members since they are most directly involved in making natural resource decisions for the agency. They thus find themselves more often than not at the center of conflicts pertaining to various natural resource, planning, and environmental issues.

The secondary internal target groups within BLM for marketing ADR are those Group Leaders and Senior Specialists in the State Offices, National Centers, and Washington Offices who have program coordination responsibilities with other Federal or State agencies and various constituency groups or organizations. This target group can benefit from the use of ADR techniques in resolving conflicts on a State, regional or national level, especially in developing agreements and memorandums of understanding for particular issues.

External:

The principal target groups outside the BLM to whom BLM will market ADR are the various customers and constituency groups who interact with BLM offices such as other Federal agencies, Native Americans, State & local governments, especially county commissioners, energy and mining companies, water users, ranchers, recreationalists, and environmental organizations. Examples of some specific groups include: Fish and Wildlife Service, US Forest Service, Indian tribes, Sierra Club, Rocky Mountain Oil & Gas Association, state parks, water boards, and the National Cattlemen's Association.

ADR Approaches

An ADR continuum exists, which ranges from the most informal and least restrictive processes, such as cooperative problem solving, to the more restrictive and formal processes, such as summary jury trials. No one ADR process is best for resolving all disputes, and not every dispute

suitable for resolution through one of the ADR processes. The following is a brief description of common ADR processes:

Negotiation - Negotiation is the process in which the parties or their agents meet and work out agreements on an issue or dispute.

Facilitation - Facilitators are individuals who assist meeting participants in organizing, conducting, and controlling a meeting.

Mediation - Mediators are third-party neutrals, who have no decisionmaking power, but who assist parties in dispute to come to agreement.

Factfinding - Factfinders are third-party advisors who are asked to gather evidence and present the facts in a dispute.

Arbitration - Arbitrators are third-party neutrals who have been given power by the parties in a dispute to issue decisions to settle a dispute.

Settlement - Settlements are often made during litigation before a judge issues a decision. "On the courthouse steps"" is a common expression for describing settlements.

Mini-Trial and Summary Jury Trial - Mini- and summary jury trials are abbreviated processes used by courts and administrative judges to encourage parties in dispute to settle their differences.

Negotiated Rulemaking - Negotiated Rulemaking or RegNeg is a collaborative decisionmaking process involving potentially affected parties to develop agency rules or regulations.

Early Neutral Evaluation - Early neutral evaluation refers to a process which helps parties in litigation to identify areas of agreement and disagreement, and to explore settlement opportunities. The neutral also can offer an overall evaluation of the case.

Collaborative Decisionmaking - Collaborative decisionmaking uses one or more ADR processes to involve affected parties in developing decisions concerning an issue or issues.

Consensus Building - A collaborative decisionmaking technique in which the objective is to have all parties arrive at workable solutions on issues, but not necessarily complete agreement.

Funding Sources for ADR

The Bureau should be proactive in gaining funding support for ADR. Once an overall strategy is developed and approved, it would be important for the Bureau to brief the Department and appropriate Congressional Committees about BLM's plan and the potential opportunities it offers for improving effectiveness and efficiency of the Bureau.

The Bureau needs to identify funds "off the top" for allocation to States for ADR on a

competitive, project basis, an investment for change and to empower those BLM organizations that are able to best demonstrate the wise use of ADR approaches in resolving disputes. Offices that require supplemental funds to procure the services of ADR neutrals may request support from the this investment fund. These funded case projects can then be used as success stories to illustrate the effective application of ADR techniques around the BLM. If specific monies are not targeted for the Bureau's ADR program, funds may not be available in some States because of diminished budgets and critical resource needs.

Action Plan for "Delivering ADR".

	Action	Who	When: Start
1	Finalize plan	NR ADR P.L.*	6/97
2	Establish a BLM ADR Steering Committee to provide ADR direction and advocacy; identify employees in each BLM organization to serve as ADR Consultants.	Director, NR ADR P.L., and each BLM State, Center and WO	7/97
3	Brief the Department and Congressional Committees.	Director and/or NR ADR P.L.	7/97
4	Develop funding sources and guidelines	WO Budget and Steering Committee	7/97
5	Identify internal and external target groups. On going	Steering Committee and internal ADR Consultants in each organization	7/97
6	Define levels of awareness/training for each targeted group.	Steering Committee, Internal ADR Consultants, NR ADR P.L., and NTC Rep	7/97
7	Develop training materials/courses and establish training schedule.	ADR Consultants, NR ADR P.L., NTC Rep, & private sector orgs.	7/97
8	Provide briefings for Field Offices, States, Centers, and WO on ADR program.	Steering Committee, ADR Consultants and NR ADR P.L.	7/97
9	Establish Incentives for using ADR techniques	Deputy Director	10/97
10	Publicize BLM ADR success stories using Home pages on Worldwide Web, Department Newsletter, and an updated BLM ADR Brochure. Incorporate "successes" into ADR training materials.	Steering Committee, NR ADR P.L. and internal ADR Consultants)	9/97

* Natural Resource ADR Program Leader

References/Sources Consulted in preparation of Marketing Plan:

1. "Natural Resource ADR Initiative Team - Background Materials - [3-ring] Notebook", Bureau of Land Management 1996.

2. Alternative Dispute Resolution, [spiral notebook] "Solid Minerals Conference," BLM, Albuquerque, NM, April 1993.

3. "Draft Brochure" entitled ADR - Preventing and Resolving Natural Resource and Public Land Management Disputes in the BLM.

4. "Alternative Dispute Resolution Program Plan - Survey of Potential Applications for ADR Methods in the BLM," Washington Office of BLM, January 1995.

5. "BLM - Alaska: Alternative Dispute Resolution Program Plan," November 1995.

APPENDIX B: Training Plan
Natural Resource Alternative Dispute Resolution Plan

INTRODUCTION

The alternative dispute resolution (ADR) training plan is designed as a manager-owned training program. Core curriculum are included in Section O of the ADR Tool Kit to assist in developing state-specific training. These core curriculum can be given to private sector trainers to develop office-specific training. The National Training Center (NTC) is encouraged to assist the ADR Initiative to develop videos and satellite training based on the core curriculum for maintenance of ADR knowledge and skills once initial training of target groups has been accomplished. We also encourage the NTC to add ADR components to all appropriate existing and new courses.

One concept of the training plan is to invite representatives of external organizations to participate in Bureau sponsored ADR training. External organizations include sister agencies such as the U.S. Forest Service, National Park Service, U.S. Environmental Protection Agency, state and local governments, environmental organizations, commodity groups, members of the media, and members of the general public. Since class size is always a limiting factor, it is incumbent on the Bureau manager sponsoring the training to determine who to invite to participate in the training sessions. The ADR Initiative Team recommends balanced representation. The rationale for including external representation is that successful implementation of the Natural Resource ADR Initiative depends on the willingness of all stakeholders to participate in the processes. Inclusive training of all stakeholders will provide all with a common level of understanding about ADR processes and their application in public land management. This sharing of knowledge about ADR should help dispel any concerns that BLM is trying to promote a hidden agenda as it implements the ADR Initiative.

Perceptions of neutrality are a fundamental concept for ADR processes and every effort should be made to demonstrate BLM's recognition of this fundamental concept. Neutral parties (private sector, universities, etc) are recommended as instructors whenever we have external group representatives invited to our training programs. This recommendation does not preclude use of internal instructor resources or presentation by a team of both internal and external instructors provided the issue of neutrality is carefully weighed. The use of neutral instructors is recommended as a measure to develop trust with our stakeholder as they will be getting the same level of knowledge from a neutral party. Neutral parties provide a better forum for developing this trust. This is also an excellent method to develop a relationship with external experts in the ADR field.

Training Components

Orientation Program:

Purpose:	To provide all employees with a basic understanding of alternative dispute resolution (ADR) processes and their application in public-land management.
Target audience:	Employees in all BLM offices. This component can also integrated into National Training Center courses.
Time Required:	1 to 1 ½ hours
When:	To be completed within one year of the approval of the Natural Resource ADR Strategic plan.
Instructor:	Local ADR consultant or other knowledgeable person designated by the manager. The Bureau program leader is available to make this presentation if so desired. The team recommends a video program be developed to assist in the necessary ongoing maintenance of the orientation information.

User Overview Program

Purpose:	Define ADR processes and concepts, when to use them, how use of ADR can enhance agency management decision making, how to contact in-house resources and external (private sector / university) neutrals, how to procure and use ADR providers from the private sector and other agencies, and the role of managers in implementing ADR programs.
Target audience:	State directors, assistant directors, center directors, district managers, areas managers, key staff, and invited external group representatives. This component can also integrated into National Training Center courses.
Time Required:	1-2 days
When:	Complete within eighteen months after the Natural Resource ADR Initiative Strategic plan is approved.
Instructor:	Recommend using private sector trainers, particularly if external representatives are invited to attend the training, using core curriculum developed by the ADR Team.

Initial ADR Consultant Technical Program

Purpose:	Provide detailed instruction on the ADR processes that are most applicable to BLM, BLM policy and vision for ADR, in how to convene and conduct ADR events, how to obtain neutrals, the role managers and staff in using ADR processes, the benefits to BLM managers by using ADR processes, and how to market ADR processes to BLM management and external organizations.
Target Audience:	Designated Bureau ADR consultants, other key staff, and external group representatives.
Time Required:	4-5 days
When:	Complete within 120 days after Natural Resource ADR Strategic Plan has been approved.
Instructor:	Bureau Natural Resource ADR Program Leader with assistance from BLM employees, and private sector / university sources.

ADR Technical Program:

Purpose:	To provide in depth, ongoing training (maintenance) training. Provide detailed instruction about ADR processes that are most applicable to BLM, in how to convene and conduct ADR events, and how to obtain neutrals.
Target Audience:	Newly appointed Bureau ADR consultants, other key staff, and external group representatives: and BLM units and their external constituencies that are proposing to use ADR processes for a specific situation.
Time Required:	4-5 days
When:	An annual offering supported by the National Training Center, preferably via satellite methodologies: and on the ground for BLM units that need in depth training before initiating a specific ADR event.
Instructor:	Recommend private sector trainer using core curriculum developed by the ADR team, and as modified based on local conditions. Internal instructors or combinations maybe appropriate for NTC long term maintenance course.

APPENDIX C: Monitoring and Evaluation Plan
Natural Resource Alternative Dispute Resolution Plan

This phase represents the critical link between the intent of the Government Performance Review Act of 1996 (GPRA), which is to improve the way we do business in a meaningful way, and tangible accountability for achieving it. Monitoring and evaluation will measure the BLM's progress towards the adoption of alternative dispute resolution (ADR) as the preferred tool to prevent and resolve conflicts and disputes. M & E also will provide the opportunity to review the relative effectiveness of various ADR methods.

When developing a new program initiative, there are three primary reasons for collecting data: First, to establish where you are in the present, the baseline. Baseline data help measure what is occurring in a program area prior to any change taking place. Second, to measure future progress relative to that baseline. Third, to assess program strengths and weaknesses, and to identify needed mid-course corrections to keep the program moving towards the "vision" of success.

The monitoring and evaluation plan for the natural resource ADR program has aspects that support all three reasons above for collecting data. BLM will measure its success by the following actions:

1. Baseline data elements will be selected and measured. A wide variety of data elements might be considered since the effect of this program will be widespread throughout the Bureau's programs. It is anticipated that baseline elements will vary among the states because of program variations. Each State Director will need identify appropriate elements for his/her state. Data elements might include the number of court hearings, number of appeals processed, and the number of informal dispute hearings conducted with a third-party neutral. The data elements, will be identified by the Steering Committee as well as the method of collection and analysis. Customer surveys and interviews with managers and employees may be useful in identifying critical data elements.

2. Data elements should correlate with baseline data elements. The important component of collecting these data is the analysis. The analysis needs to identify how the ADR program is changing the BLM culture in regards to handling conflict. Elements might include more disputes settled during an earlier stage of conflict; using third-party neutrals or facilitators as a routine way of doing business.

3. Meaningful performance incentives for encouraging the Bureau wide use of ADR will be developed. These incentives may be financial or career-enhancing in nature, or both. These should include: incentives language inserted into employee performance plans (EPPRRs, and the use and advocacy of ADR made a critical element in the performance plans of State Directors and District and Area Managers. In addition, the demonstrated competency in the use and advocacy of ADR tools and methods should be used as a critical hiring criteria in the selection and hiring of future DMs and AMs (i.e., a Knowledge, Skill, and Ability requirement).

4. Include ADR progress measurements as a reporting element under the Government Performance Review Act of 1996 (GPRA). This step will ensure yearly monitoring of the initiative and supports this government wide cost-cutting program.

5. Coordination with BLM and other Government outreach, partnership-building, and community collaboration efforts should become an integral part of the development of the ADR initiative, especially in the early stages. The inclusion of external stakeholders in the development and implementation of BLM's ADR Program should be emphasized (i.e., citizen alliances).

6. Based on the above measures, the Steering Committee will address what changes need to be made to the ADR initiative in order to continuously improve the process. Changes might include establishing future training needs, streamlining the contracting procedures, and providing enhanced financial or career incentives for utilizing ADR tools and techniques.

The Steering Committee has an important role to play in this plan. As one of their first activities, the Committee must coordinate with State Directors, Assistant Directors, and Center Directors to identify data elements under each of the actions described above and determine how and by whom the data should be collected.

Natural Resource Alternative Dispute Resolution Initiative

ALTERNATIVE DISPUTE RESOLUTION TOOL KIT

"Discourage litigation, persuade your neighbor to compromise where you can. Point out to them how the nominal winner is often a real loser....in fees, expenses, and waste of time."
Abraham Lincoln, 1851

Bureau of Land Management
Washington, D.C.
1997

ALTERNATIVE DISPUTE RESOLUTION TOOL KIT

Compiled by John R. Schumaker, Ph.D.

This Alternative Dispute Resolution (ADR) Tool Kit was developed in 1996 by the Natural Resource Alternative Dispute Resolution Initiative Team of the Bureau of Land Management(BLM). This document is presented in a format to facilitate continual update as the BLM gains experience in the use of ADR processes. BLM managers and staff are encouraged to update or add sections to this document as they use ADR processes. They are also requested to suggest new items for inclusion that may be useful to other BLM offices. Changes can be posted and viewed at the Natural Resource ADR Home Page at: www.blm.gov/nradr.

Acknowledgments

The team members who represented most offices in the Bureau were: **Brad Brown**, Organizational Development Specialist, Montana State Office; **George Farrow**, Human Resource Manager, Lower Snake River District, Idaho; **Nancy Golden**, Associate District Manager, Salt Lake District, Utah; **Helen Hankins**, District Manager, Elko District, Nevada; **Ron Hooper**, Riparian Specialist, Arizona State Office; **Jerry Kidd**, District Manager, Lower Snake River District, Idaho; **Jack Mills**, Planning & Environmental Staff, California State Office, **Marcia Moore**, Planning & Environmental Analyst, Renewable Resource and Planning Staff, Headquarters 210; **Peter Niebauer**, Group Manager, Business and Fiscal Services, Headquarters 300; **Mary Linda Ponticelli**, Planning & Environmental. Analyst, Renewable Resource and Planning Staff, Headquarters 210; **Walt Rewinski**; Deputy State Director, Resource and Planning, Use and Protection, Eastern States Office; **John Sherman**, Procurement Analyst, National Business Center; **Leslie Simmons**, Hazardous Materials Specialist, Alaska Fire Service; **Eleanor Schwartz**, Senior Specialist, Counsel to AD, Communications, WO 600; **Dave Strunk**, Social & Cultural Resources Leader, Colorado State Office; **Tom Wawro**, Geologist, Oregon State Office; **Richard Whitley**, Deputy State Director, Resource and Planning, Use and Protection, New Mexico State Office; **Ray Wilson**, Equal Employment Opportunity Manager, Wyoming State Office; **Janet Youngdahl**, Management Analyst, National Applied Resource Sciences Center; **Larry Sovinsky**, Intern, ADR Program, University of Denver; and **Dr. John Schumaker**, Team Leader and Natural Resource ADR Program Leader, National. Special Projects and Initiatives Team, Office of the Deputy Director, Headquarters 107(Denver).

William C. Calkins, State Director, New Mexico State Office, is the Executive Leadership Team sponsor for the Natural Resource Alternative Dispute Resolution Initiative.

Table of Contents

Section A.	Other Bureau of Land Management, alternative dispute resolution programs
Section B.	Stages of alternative dispute resolution
Section C.	The Dispute Prevention / Resolution Continuum
Section D.	Glossary of alternative dispute resolution terms
Section E.	Indicators: When is using alternative dispute resolution appropriate
Section F.	Survey of potential applications for alternative dispute resolution in BLM
Section G.	Procuring neutrals
Section H.	Federal Advisory Committee Act
Section I.	Convening an alternative dispute resolution event
Section J.	Consensus: What does it mean?
Section K.	Ground rules
Section L.	How alternative dispute resolution processes proceed
Section M.	Sources of alternative dispute resolution practitioners
Section N.	Standards of ethics and conduct for alternative dispute resolution neutrals
Section O.	Core curriculums for alternative dispute resolution training
Section P.	Alternative dispute resolution position descriptions
Section Q.	Case studies
Section R.	Questions to ask potential alternative dispute resolution practitioners
Section S.	Sample agreements to use alternative dispute resolution

OTHER BLM ADR PROGRAMS

The alternative dispute resolution (ADR) processes that are appropriate for natural-resource, public-land management dispute prevention and resolution are also used in a variety of other administrative programs.

Procurement and Contracting: Contracting officers are encouraged to use ADR processes such as negotiation, mediation, and arbitration to resolve disputes with contractors. See IB No. BC - 96-048, Use of Alternative Dispute Resolution, July 1996, for information regarding use of ADR.

Equal Employment Opportunity (EE0): The EEO program has established a mediation program to assist agency managers and employees to resolve EEO complaints. The EEO program has trained many employees to serve as mediators for this program. See Instruction Memorandum No. 96-46, Issuance of Policy on the Utilization of Alternative Dispute Resolution (ADR) in the Bureau of Land Management, and the Implementation of the Equal Employment Opportunity/Alternative Dispute Resolution (EEO/ADR) Pilot Program Plan, February 2, 1996, or your local EEO Officer for information regarding this program.

Labor Management Relations: A number of BLM offices have negotiated contracts with employee unions. These negotiated contracts typically contain arbitration clauses as a means for resolving disputes between management, the unions and those employees who are in the bargaining units. These contracts are specific for each office that has a union, and each has specific negotiated language, therefore: it is essential to contact the specific office for information regarding dispute resolution procedures for that bargaining unit.

Value Disputes in Land Exchanges. In 1988 The Federal Land Exchange Facilitation Act was enacted. This Act amended Section 206 of FLPMA. The Act is applicable to the Forest Service as well as the BLM. Among other things, the Act requires the use of arbitration if the parties to the land exchange could not reach agreement on value within 180 days of receipt of the appraisal reports. The only exception was if the parties agreed to use some other dispute resolution method. Methods for resolving potential disputes concerning value are usually covered in the initial agreement between the parties to pursue a land exchange. See page 2 or Contact Dave Cavanaugh, Lands and Realty Group, WO 350, (202) 452-7774 for additional information on this use of ADR processes.

From: Dave Cavanaugh
To: ILMNCA01.ILMNCB01.jschumak
Date: 5/13/97 7:01am
Subject: Arbitration of land values - Reply

Ray referred your message to me. I am the point-of-contact in WO 350 for policy regarding resolving disputes concerning value.

In 1988 The Federal Land Exchange Facilitation Act was enacted. This Act amended Section 206 of FLPMA. The Act is applicable to the Forest Service as well as the BLM.

Among other things, the Act required the use of arbitration if the parties to the land exchange could not reach agreement on value within 180 days of receipt of the appraisal reports. The only exception was if the parties agreed to use some other dispute resolution method. Methods for resolving potential disputes concerning value are usually covered in the initial agreement between the parties to pursue a land exchange.

This provision was passed by Congress since it was felt that disputes concerning value were holding-up worthwhile exchanges. Land exchanges are voluntary and require mutual agreement among the parties. It was recognized that appraising was an art not a science and that reasonable people may disagree as to the appropriate market assumptions and the resulting values. Therefore, it was agreed that a method was necessary to resolve reasonable disputes.

The exchange process attempts to build a trust relationship that results in an exchange that is mutually beneficial. The goal is avoid polarizing the process so that the parties do not waste their time or money. It was anticipated that the parties to the transaction would reach agreement on schedules, shared costs, appraisal responsibilities and that the parties genuinely wanted to pursue the exchange. This evolving relationship would facilitate reaching agreement on value.

We are a few cases where we have used mediation or other process to reach agreement. We have had varying degrees of success, most initiated with very little expertise in dispute resolution. In one case involving the Forest Service the process may have been altered to bring about a predetermined outcome.

In many cases the BLM offices are reluctant to use this tool, opting instead to requiring the values be based on the approved appraisal. This is due in part to their unfamiliarity with the dispute resolution process.

Unfortunately, most of our land acquisition experience in the Government is based on eminent domain or condemnation. This is a vestige of a time when Congress granted condemnation authority for building large public improvement projects. Land acquiring agencies were granted condemnation authority and if we could not acquire the property through negotiations we would take property through a condemnation process. Agency philosophy was to offer an amount based on the approved appraisal on a take-it-or-leave-it

basis. If the property owner did not accept the offer, the agency would condemn the property and it was left to the courts to set the amount of just compensation.

Agencies abused this authority and Congress in 1970 passed the Uniform Relocation and Real Property Acquisition Policies Act. This Act directed agencies to reduced litigation and seek amicable settlements with property owners. Agencies were obligated to offer an amount which it believed to be just compensation and it shall not be less than the agencies approved appraisal. Congress recognized that the final settlement may be different from the approved appraised value. The Act did not specify any dispute resolution methods.

Congress has been reluctant to grant eminent domain authority on small acquisition projects, electing instead to require the agencies to only acquire property if they can reach agreement. Agreements in excess of the approved appraisal (on Land and Water Conservation funded projects, not land exchanges) must be sent to the Committees on Appropriation for approval. This requirement is part of Reprograming Procedures established by Congress. This was required because certain agencies were paying substantially more than amounts appropriated by Congress.

I believe appropriate use of dispute resolution methods for voluntary transactions would facilitate land acquisition and exchanges. It is my hope that in the future this will be a normal practice when confronting reasonable disagreements on value.

If you have any thoughts or questions on this, give me a call at 202-452-7774 or send me a E-Mail.

CC: rbrady,dbeaver

Stages of ADR

ADR WITHIN THE AGENCY

DISPUTE PREVENTION: The use of collaborative processes can be initiated by agency managers, generally early in the process of agency decisionmaking, to obtain input and assistance from the stakeholders before disputes arise. Collaborative processes often use ADR processes such as negotiation, facilitation and mediation to make the collaborative process work.

DISPUTE RESOLUTION: Agency managers can initiate ADR processes such as negotiation, facilitation, and mediation to resolve existing disputes. Arbitration may be used to resolve human resources and business practice disputes, however, the arbitration process has limited, if any, use in resolving natural resources disputes.

ADR IN THE ADMINISTRATIVE APPEALS SYSTEMS (IBLA, MSPB, EEOC etc.):

DISPUTE RESOLUTION: Agency managers may encourage/suggest using ADR processes such as negotiation, mediation, factfinding, or settlement and Administrative Law and Administrative Judges may elect to use or encourage agency managers and appellants to use an ADR process such as mediation, factfinding and settlement to resolve the dispute before proceeding with adjudication of the case. Some judges may order settlement conferences.

ADR IN THE FEDERAL COURTS:

DISPUTE RESOLUTION: U.S. Attorneys may seek to use ADR processes such as mediation, early neutral evaluation, factfinding, settlement, mini-trials, or summary jury trials, or the presiding judge may order use of one or more of these ADR processes to resolve the dispute before proceeding with adjudication of the case.

Section C: The Dispute Prevention / Resolution Continuum

The Dispute Prevention/Dispute Resolution Continuum

	Dispute Prevention		Dispute Resolution
Activity	Our Day to Day Business	Collaborative Projects	Alternative Dispute Resolution
Process	Negotiation, facilitation	Negotiation, facilitation	Negotiation, facilitation, mediation, arbitration, summary jury trials, mini trials, med-arb, settlements, factfinding, special masters
Applied to:	Negotiations between field employees, office staff, or managers with customers often occur regarding operational issues and facilitation of public meetings under NEPA are examples.	Collaborative decisonmaking in land use planning; Community partnerships; Consensus building projects.	Resolving arguments, complaints, protests, appeals, and court cases.
Control features	BLM and customers control how, when, and what the outcomes will be.	BLM and customers control their participation in projects. Once a decision is made to participate or to continue to participate, the group process may control outcomes, except BLM managers have to follow the law and can negate outcomes if they are contrary to policy,or law.	BLM and customers control use in early stages such as protests, control shifts to solicitors, attorneys, and judges as cases enter administrative appeals and judicial systems. BLM and clients however can recommend or push for use of ADR for cases on appeal or in court.
Linkage	All phases are interlinked. All phases use some common procedures, mostly negotiation and facilitation. For example, BLM and clients who negotiate in the field over operational issues may be characterized as involved in informal, but critical, dispute resolution to prevent escalation of a dispute to formal administrative appeals or court systems.		

D. Glossary of ADR Terms

E. When is ADR Appropriate

Section D. Glossary of ADR terms

Glossary of ADR Terms
by John R. Schumaker, Ph.D.

I. FORMS OF ALTERNATIVE DISPUTE RESOLUTION (ADR):

NEGOTIATION: Negotiation is a form of dispute resolution that is conducted directly between the parties or their agents. Negotiations are typically private and controlled by the parties as to content, timing, and structure.

FACILITATION: Facilitation is a process in which one or more individuals assist meeting participants in maintaining direction and keeping participants focused on agreed-upon agendas. Facilitators are often meeting managers whose skills are in making adequate meeting arrangements, keeping track of proceedings and assisting the meeting director or moderator in conducting a meeting. The line between facilitation and mediation is often indistinct and the terms may be used interchangeably. It is common for a mediator to be a facilitator, but not the reverse.

MEDIATION: Mediation is a dispute resolution process whereby a neutral third party(s) acts to encourage and facilitate the resolution of disputes without the power to prescribe a solution. Mediation programs may be voluntary or mandatory. Mediator selection may be decided by the parties or may be imposed by prior agreement or by a court. Mediation processes are varied and often are the result of the style of the mediator.

CONCILIATION: Conciliation is a form of dispute resolution similar to mediation in which the emphasis is not only on the resolution of specific issues in disputes but also in the repair or establishment of relationships between parties who had or need to have an ongoing relationship. Third parties who assist with conciliation need not be necessarily neutral, in contrast to mediation.

ARBITRATION: Arbitration is a process in which a third party(s) listens to the facts and arguments presented by the disputants and renders a decision. The decision may be binding or non-binding depending on the prior agreement between the parties. Arbitrations are normally much less formal than a court.

MED-ARB: Med-arb is a process in which the parties have agreed to first attempt to resolve their differences by using a mediator, and if unsuccessful, proceed to have the dispute arbitrated. The neutral(s) who serves as the mediator may or may not serve as the arbitrator, depending on the prior agreement between the parties.

FACTFINDING: Factfinding is a process in which a neutral third party is retained by the parties or appointed by an appropriate authority to gather evidence and determine the facts in a dispute. Factfinding is an advisory and non-binding process, but the factfinder may be asked to provide recommendations.

EARLY NEUTRAL EVALUATION: Early neutral evaluation is a term described in the Department of Justice Guidance for the Use of ADR for Litigation in the Federal Courts. It is "an informal process, whereby the parties or the court select a third party neutral to investigate issues and submit a report or testify in court." The neutral may help the parties develop a discovery plan, identify areas of agreement and disagreement, explore settlement opportunities or offer an overall evaluation of the case. The procedure is non-binding and, generally, the results are not admissible in court. This procedure looks a lot like a variation of factfinding although the DOJ guidelines specifically identify factfinding as a separate procedure. This is an example of the many variations in terms and procedures found under the ADR umbrella. It is essential that parties in a dispute and their representatives/advisors understand the differences in terms and procedures.

SUMMARY JURY TRIAL: Summary jury trials (SJT) are court-run programs. The purpose is to give the parties a peek at how a real jury might decide their case without going to the expense and time of a real trial. It is a short proceeding, generally one-half to one day, in which the attorneys for the parties to the dispute are each given about an hour to summarize their case before the jury and the judge gives a brief explanation of the law. The jury's decision is non-binding unless the parties have agreed to accept it as binding ahead of time. One advantage of a SJT is that it gives parties who can't afford a full trial their day in court. Settlements often occur immediately after SJT's.

MINI-TRIAL: The mini-trial is a very private, voluntary, generally non-binding procedure. It is an informal summary of the parties positions before a neutral moderator or advisor. A retired judge is often used as the neutral advisor. The mini-trial is conducted in the presence of high-level management representatives who have the authority to settle the case. The purpose is to reveal the theories, strengths, and weaknesses of each side as an aid to resolve the case. Settlements often occur immediately after mini-trials.

PRIVATE JUDGES or RENT-A-JUDGE: This technique is a fairly new innovation by some private dispute resolution firms and some courts. Retired judges typically are used to hear these cases which would have been taken to a real court, and the parties agree in advance to accept the decision as if it were a real court decision. The advantages of this process are speed, privacy, and the ability of the parties to select a judge with expertise in the disputed matter.

OMBUDSMAN: An ombudsman may be appointed by ordinance, statute, an association, a particular business, a federal agency or other means. The ombudsman serves as an

investigator, red tape cutter and/or facilitator for complaints, questions or issues brought forward by clients, users, or employees of the ombudsman's employer.

SETTLEMENT: Settlement is normally described as a form of dispute resolution that normally takes place after formal charges or complaints have been filed in court or with formal agency dispute resolution systems and before the adjudicator, the judge or arbitrator, has rendered a decision.

SETTLEMENT JUDGES: A settlement judge serves essentially as a mediator or neutral evaluator in cases pending before a tribunal. The settlement judge is usually a second judge from the same body as the judge who will ultimately make the decision if the case is not resolved by the parties. Magistrates in the Federal court system often serve as settlement judges and may compel attendance of senior officials and business heads who have decisionmaking authority.

CONSENSUS BUILDING: Consensus building uses ADR processes such as negotiation, facilitation, or mediation to address issues before serious and protracted disputes arise. By bringing all affected parties (the stakeholders) into the process as early as possible the consensus building procedure has been effective in resolving major multi-party, multi-agency, multi-government environmental problems. The mediators in this form may take a proactive role in defining the stakeholders; getting stakeholders to agree to the mediation effort; guiding the process; and upon reaching resolution, administering the process of documentation by getting the final approval and signatures from authorized decision makers.

CONVENING: Convening helps to identify issues in controversy and the affected interests. The convener generally determines whether direct negotiations among the parties would be a suitable means to resolve the issues; and, if it is, the parties are brought together for that purpose.

NEGOTIATED RULEMAKING (REG-NEG): Negotiated rulemaking is a process in which the content of a proposed rule is developed through negotiation by representatives of affected interests, including the agency. The Negotiated Rulemaking Act of 1990, Public Law No. 101-648, which was made permanent in the 1996 Administrative Dispute Resolution Act, provides this authority.

HEARINGS: Hearings in the ADR sense are informal dispute resolution forums in which a "hearings" officer is designated by appropriate administrative authority such as a city ordinance or Federal statute. This differs from the formal hearings before an administrative or administrative law judge in formal administrative adjudication forums such as the Interior Board of Land Appeals.

STAKEHOLDERS: Stakeholder are all the individuals, organizations, and agencies that

meet the definition of a "party" found in Title 5. In general, this means all citizens, businesses, and institutions, public and private, that have standing and will be affected by decisions relating to an issue in controversy.

DEFINITIONS OF ALTERNATIVE DISPUTE RESOLUTION

ADR is any process used to prevent, manage, or resolve conflicts using procedures other than traditional courtroom litigation or formal agency adjudication programs where a "Judge" issues a decision or an order based on the merits of the case as presented by lawyers or disputing parties. In almost all cases, in the traditional litigation processes, the presentation for the parties is done by their attorneys and the parties are only observers or carefully controlled witnesses. These formal processes often preclude the introduction of nonlegal concepts, discussions, and solutions even when they may be the best solutions to the conflict. Conversely, in many ADR processes, the parties in dispute speak for themselves even when their attorneys are present. Studies show that parties to mediation are more likely to comply with the terms of the agreement reached in mediation because the parties have a direct voice in presenting their information and in developing terms of agreement (Dennison, 1993). This compliance benefit, in addition to benefits in flexibility, cost reduction, time savings, confidentiality, informality, and preserving relationships may be the most valuable reason for using ADR processes.

A broad definition of ADR includes activities to resolve disputes after they have been taken to court or a formal agency forum. Many ADR programs are court-connected. When a complaint or suit is filed in a court system, the court orders an alternative to the court process before the point at which a decisionmaker, the judge, must issue a decision or order. An increasing number of courts are adopting ADR procedures, mediation in particular, which direct parties in dispute to try to resolve their problems with the assistance of a mediator. ADR is popular with the courts because the quality of agreements is improved, and resolution time, costs, and case loads are reduced.

Another common definition of ADR is: any procedure other than litigation, including, but not limited to, conciliation, mediation, arbitration, hearings, negotiation, settlements, mini-trials, factfinding, summary jury trials, private judges or combinations of ADR techniques to resolve issues between two or more parties.

Alternative dispute resolution processes

This list is not all encompassing. New terms and processes are being developed by ADR practitioners, but most of the newer processes are generally refinements or combinations of the processes listed below.

Negotiation
Negotiation covers a wide range of communications that take place to resolve differences or to cause people to agree to a common goal or resolution of issues. Negotiation is conducted directly between the parties by either the party principals or their appointed agents. The key to the definition is that third-party neutrals are not involved in the process of resolving the

dispute or coming to agreement. Negotiations are generally private and controlled by the principals as to content, timing, and structure. Negotiations can be described as legal negotiation and other negotiations that are not conducted to resolve existing or potential legal points (Williams, 1986)

Settlement

Settlement may be described best as a form of dispute resolution that occurs after claims or complaints have been filed in a formal dispute resolution forum. A typical settlement scenario takes place on the courthouse steps immediately before the beginning of a trial. Trial attorneys make last minute settlement offers on behalf of their clients and, if accepted, "settle" the dispute. A number of court jurisdictions have established programs to appoint settlement masters and settlement judges to help the parties before proceeding with a court case (Joseph and Gilbert, 1989). A key to describing an ADR activity as a settlement rests on the time, place, and circumstances of communications that resulted in the settlement of the issue in dispute. Judges may decide to participate in settlement efforts by directing parties to seek settlement before proceeding with a case. As an example, administrative judges for the the Federal personnel appeals authority, the Merit System Protection Board (MSPB), now routinely require agencies and appellants to enter settlement discussions before judges will proceed to adjudicate the case.

The Department of Justice (DOJ) has issued guidelines that reaffirm the limits of monetary settlement that can be exercised by Federal officials in litigated cases. The authority to settle is restricted to assistant US Attorney's limited to settlements under $500,000; up to $2 million for the Assistant Attorney General, and all authority over $2 million resting with the Associate Attorney General (World Arbitration & Mediation Report, 1992).

Facilitation

Facilitation is defined as a process in which one or more individuals help participants at a meeting maintain direction and keep focus on agreed-upon agenda items. Facilitators are often referred to as meeting managers whose skills are in making adequate meeting arrangements, keeping track of the proceedings, and helping the meeting director or moderator conduct the meeting. The line between the definition of a mediator and a facilitator is often blurry. The terms mediator and facilitator are used interchangeably in some cases. Both use unbiased, neutral language to communicate with all parties. It is common for a mediator to be a facilitator but not the reverse.

Mediation

Mediation is a process by which a neutral third-party or panel acts to encourage and facilitate the resolution of a dispute without the power to prescribe the solution. The Standing Committee on Dispute Resolution of the American Bar Association (ABA) describes mediation as ". . . is usually a private, voluntary, informal process where a party-selected neutral helps disputants to reach a mutually acceptable agreement" (Hinchey, 1992).

Mediation programs go beyond this definition because some are mandatory and others do not provide the disputants with the option to select the mediator. There may be as many forms of mediation as there are disputes, but the format for conducting a mediation falls into several basic styles. These differences primarily involve who the mediator is, the focus of the mediation effort, and the manner in which the mediator or mediation panel conducts its business. It is common for disputing parties to agree on selecting the mediator.

The ABA Committee defines the basic types of mediation as rights-based, interest-based, and therapeutic. The definition of each depends on how much emphasis is placed on the legal principles or rights in the dispute; problem solving based on the crafting of ingenious solutions outside the legal principles involved; and, finally, those mediations in which feelings and emotions have an equal or superior level of emphasis as the legal issues (Hinchey, 1992).

The three basic types of mediation, according to the ABA Committee, are listed below::

1) "Rights-based mediation is most familiar to the trial lawyer. A lawyer may be involved either as the non-party neutral or as the parties representatives. The goal is to settle a dispute with attention given to the identified legal rights of the parties."

2) "Interest-based mediation is more freewheeling with less attention given to the individual legal rights of each party, but with a focus on the parties' interests or compelling issues of the dispute." Interest-based mediation is typical of many natural resource disputes.

3) "Therapeutic mediation focuses more on the problem-solving skills of the parties involved. The mediator may emphasize the emotional dimensions of the dispute. Often, the parties discuss ways of handling similar conflicts in the future."

Another way of describing mediation processes divides mediation into two models, the evaluative and transformational models. These models are similar to those described by the ABA. Evaluative mediation consists of analysis of potential risks and benefits in a continued course of action, I. e., litigation or arbitration. This style is preferred by many attorney mediators and allows the mediator to express his/her evaluation of the strengths and weaknesses of each parties case. There are ethical concerns within the legal community about this style of mediation since it may seen as providing legal advice by the same attorney to both parties. It may also tend to be confrontational and border on the adversarial process found in our legal systems. Transformational mediation focuses more on emotional and personal issues such as relationship building (Herrman and Ashbaugh, 1994).

Another way to explain mediation is by the manner in which parties interact with each other and with the mediator(s). One form of mediation emphasizes direct face-to-face meetings of the parties in dispute in a process where all parties are present nearly all the time. The disputants or their spokespersons conduct direct dialogue with the other disputants once a

third party, the mediator, has established communications between them. The role of the mediator then becomes one of an educator, keeping the discussions on track and insuring that effective communications are maintained. The mediator may or may not become involved in helping in the formulation of solutions. A mediation effort conducted by Thomas Colosi of the American Arbitration Association (AAA) for the U. S. Forest Service's Klamath National Forest in northern California appears to be a successful example of this form of mediation. The dispute involved proposed timber sales after a wildfire had burned about 260,000 acres in 1987 (Alternative Dispute Resolution Report, 1988).

Commercial or business mediations tend to be conducted without the parties meeting face to face except during some preliminary meetings and at the conclusion of the mediation. The mediator in this style holds confidential private sessions (caucuses) with each of the parties. The mediator then works or "shuttles" between the parties to convey attitudes, information, and proposals, ever careful not to violate confidences shared in the private sessions. The mediator may or may not take a proactive role in developing solutions or approaches for the resolution of the dispute. The role or style of the mediator may be defined in advance or may arise based on the individual style of the mediator or the sophistication of parties with mediation. This process may look like a negotiation. The key distinction between mediation and negotiation, is that in a mediation, the agent, who is the mediator, is neutral; whereas, in negotiation the agent(s) represents one or more of the parties.

A typical commercial or business mediation will resolve a conflict, for example, between a contractor and subcontractor, by developing solutions that work but may not be those solutions arrived at in a court of law. The parties may look at areas such as contract adjustment, apologies, debt structure, future business, timing, ownership, control, exchange of services, and cost avoidance. The objective is to design a solution that minimizes loss or damage and maximizes the chance of all parties to stay in business. As observed by Sander (1986), it is the ingenuity in the potential solutions that can be reached between the parties in mediation that place it beyond the capability of the formal adjudicative systems.

Labor relations mediations are often conducted in an aggressive style in which the parties use the mediator to convey proposals, feel out the opposition, continually narrow differences, and attempt to influence one party to accept the other party's position. This style, and international mediations such as the shuttle diplomacy conducted by former National Security Advisor and Secretary of State Henry Kissinger, are the more visible forms of mediation in the U.S. and often are seen as the "correct" way to conduct mediations.

Consensus building consists of negotiation, facilitation, and mediation processes used to solve problems before serious and protracted disputes arise by bringing together all the stakeholders as early as possible. Consensus building and collaborative decisionmaking often are used interchangeably. A specific example of a successful consensus-building mediation focused in conflict prevention was the exhaustive effort to clean up PCB's in the

New York Bight (McCreary, 1989). This effort incorporated use of active third-party neutrals, mediators, to build a consensus agreement among many parties and resolved a major environmental problem without resorting to lawsuits or appeals to agency administrative adjudication forums. The mediators in this example took a proactive role in defining the stakeholders; getting them to agree to the mediation effort; guiding the process; and, upon reaching resolution, administering the process of documentation, and final approval, and signatures from authorized decisionmakers.

Another type of mediation described in the Department of Justice Guidelines for ADR for Litigation in the Federal Courts is referred to as "Michigan-type" mediation (Department of Justice, 1992). This mediation model can result in an award by the mediator. A decision in 1993 in the Michigan courts ruled to affirm an order that stated the parties may agree to a modified mediation procedure in which the recommendations of the mediator were binding (World Arbitration and Mediation Report, 1994b). This has many characteristics of the med-arb procedure described later in this appendix.

Mediation programs also may be defined on the basis of their relationship to the court system. Many programs are a function of the court and are referred to as court-connected, as in many jurisdictions for family law such as child custody. The mediations may be arranged voluntarily or may be the result of a court order. Many jurisdictions have programs in which the mediators are part of the court staff and mediation sessions are free of cost to the parties in dispute. Other jurisdictions have established referral services to private practitioners, which may or may not be free to the parties.

An unabated debate continues over whether or not disputants in family courts should be required to pay for court-ordered mediation. There appears to be little debate over this issue in other arenas. Normally, parties in dispute share the cost of mediation unless other specific arrangements or agreements have been made.

Many mediation activities are operated independent of the courts. Examples are business mediations conducted within their own structure or with the assistance of organizations such as the AAA. Other examples are the community-based mediation or neighborhood justice programs such as the Sounding Board in Boise, Idaho. This program responds to requests for mediation from members of the community, accepts court or police referrals, and also accepts referrals from municipal departments such as planning and zoning commissions.

Conciliation

Conciliation usually means a form of third-party intervention or mediation in which the emphasis is not only to resolve disputes but also to repair or re-establish good relations among parties who need ongoing relationships. It would be difficult to distinguish the ABA's definition of therapeutic mediations from the definition of a conciliation effort. The key difference may rest on the relationship of the parties. Conciliation relates to those who have

close or personal continuing relationships such as family, neighbors or close business associates. This is the form used by many community dispute resolution panels, usually trained volunteers, to resolve civil disputes between members of a community. Consideration and resolution of "feelings" issues between parties are seen as important or more important as the resolution of the substantive issue in dispute. In community mediation or conciliation programs, it is common to find that the complaint first presented, for example, the barking dog, is often a superficial expression of another problem, often a longstanding, underlying dispute that surfaces because feelings are admissible.

Some practitioners contend there is no difference and the meaning the terms mediation and conciliation arose from the name of the Federal Mediation and Conciliation Service (FMCS). One story is that both terms were included in the agency's name because one house of Congress used the term conciliation and the other used the term mediation in the bills that created the FMCS. The conference committee used both to resolve a conflict over the semantics. I don't know if this is a true story, but research into the legislative history of the FMCS might provide an answer.

Arbitration

Arbitration is a process whereby a neutral third party or panel listens to the facts and arguments presented by the disputing parties, and the arbitrator renders a decision that may or may not be binding in accordance with the prior agreement made between the disputing parties. Formal rules of evidence, including those related to heresy, are often set aside and it is left to the arbitrator(s) to determine the truth and value of the evidence in the documents and testimony presented to them.

Soia Mentschikoff (1961) of the University of Chicago Law School described commercial arbitration using three different models: Umpire, Adversary, and Investigative. Subsequent paragraphs describe these models.

Umpire Model: Usually a single person is entrusted to make a decision without the participation of the parties, but at the instigation of one or both parties. Disputes typically resolved using this model are characterized by four factors: 1) relatively small monetary amounts and affect on the parties and their group, 2) standards and norms are relatively clear to the parties and their group, 3) a desire for speedy settlement, and 4) facts must be clearly discernible by the umpire. This model frequently is used by trade or commercial groups and its chief value is the speed and economy of the decision. Decisions are not unlike those made by traffic cops or quality inspectors in the commercial sector. The umpire rarely has the power to make the rules but merely applies rules made by the body representing the parties.

Adversary Model: 1) Disputing parties control whether to use the procedure, 2) what issues to present for decision, and 3) what data and arguments to present. The burden of investigation and case preparation is on the disputing parties. Some segments of society may

have established prior ground rules for this model. For example, the Better Business Bureau (BBB) in its automobile arbitration agreement with automobile manufacturers has established rules that allow consumers to bring complaints to arbitration. The manufacturers have agreed to abide by the decision of the arbitrator while allowing the consumer to accept or reject the decision of the arbitrator. Customizing the process as in the BBB agreement is typical for many commercial arbitration agreements, including those for brokerage houses and medical groups. Probably the most common and easily recognized form of adversary arbitration is typified by labor-management arbitration programs.

Investigatory: This model is used by groups to keep its members, licensees, or regulated businesses in line and to bring offenders in to the obeying established standards of practice. It is characterized by decider control. An entity, for example, a professional association's ethics committee rather than a party, decides if the party has violated group norms and if a dispute needs to be adjudicated by an arbitrator, what issues will be considered, and what data and arguments will be accepted. The burden of initial investigation and case preparation is on the deciders. This model and a sub-model, the investigatory-parental model, are typified by the proceedings of some administrative agencies, commercial groups, and ethics and business practices committees of commercial groups.

Arbitration programs also can be characterized by the different approaches taken by the AAA and the typical self-contained trade groups (Mentschikoff, 1961). The primary differences relate to the precedence value of arbitration decisions and the manner in which decisions are enforced. Both models take the general position that the courts are not available for final determination of the legal issues and errors in law are not grounds for setting aside an arbitration award. The AAA looks to the courts to enforce arbitration decisions made by AAA sponsored arbitrators but self-governing trade groups use internal means to enforce arbitration decisions. The principal legal question of enforceability of an arbitration award by the courts in the United States relate to questions of procedure (Mentschikoff, 1961).

The AAA rules and regulations were set up primarily to ensure its awards would not be set aside by the courts on procedural grounds. The AAA deliberately follows a system that discourages precedent setting by requiring its arbitrators not to write opinions, but to state only the amount of the award. The AAA looks to the courts to enforce its arbitrators' awards but not to review the substance or procedures. The AAA encourages parties to be represented by attorneys (Mentschikoff, 1961).

Most self-governing trade groups, on the other hand, see great value in establishing precedence through its arbitrators' awards and awards are enforced by using internal sanctions against its members. These groups often discourage or expressly forbid the use of attorneys to represent the disputants. Self-governing trade groups try to avoid review by the courts (Mentschikoff, 1961)

Other programs use combinations of these methods that best suits their needs. The BBB requires written decisions. Decisions are reviewed closely by the BBB staff for correct procedure and adherence to the arbitration agreement and to ensure decisions are linked directly to the request for arbitration from the consumer. The decisions of the arbitrators have no precedence value. The BBB discourages the use of attorneys and relies on trained community volunteers to serve as its arbitrators.

Labor relations arbitration is similar to a judicial proceeding and result in a written decision justified by reference to general principles, yet the arbitrator's decision has no precedence value. In Federal labor relations procedure, however, a form of precedence is used because arbitrators in Federal labor disputes must follow the precedents established by rulings of the MSPB for those issues that can be appealed to the MSPB.

The opportunity to establish a variety of arbitration programs is evident. In some programs the arbitrator's decision is binding on both parties, for example in many labor management programs; in other programs, one party binds itself to the decision of the arbitrator but allowing the other party the right to accept or reject the decision, for example in the BBB's autoline program; and there are programs that allow both parties a nonbinding option, which then moves the process toward a factfinding process instead of an arbitration.

Med-Arb

Med-Arb is a combination of mediation and arbitration processes (Sander, 1975). Parties often agree to try to work out their differences first through mediation but, if mediation does not work, parties then agree to proceed directly to arbitration. The parties agree in advance how to declare the mediation effort unsuccessful and who has the authority to do so. This may be the mediator or one or both of the parties. The initial agreement usually addresses who the arbitrator will be. Some agreements call for the mediator to change hats and become the arbitrator; however, another school of thought is that the mediator has become too involved and has too much confidential information to act as an unbiased arbitrator. In this case, a new neutral party is selected to arbitrate the case (Sander, 1975).

The AAA supports the med-arb process by the way its administrative fees are structured. Parties who use the AAA to arrange a mediation pay a relatively modest fee to AAA for the administration of the mediation effort. In those cases where mediation is unsuccessful, AAA deducts the mediation administrative fee from the arbitration administrative fee. The fee includes scheduling, meeting places, notifying parties, and providing names of mediators and arbitrators from their lists of recommended ADR professionals. Parties make their own fee agreement with the mediator or arbitrator.

MEDALOA™

The AAA announced a new procedure in November 1993 called "Mediation and Low Offer Arbitration" MEDALOA. In this process, parties are encouraged to try to settle their dispute

in a mediation session but, if all issues cannot be resolved, submit the unresolved issues to an arbitrator. Each party submits its final demand and final offer to the arbitrator who then must select between the two positions presented by the parties (World Arbitration and Mediation Report, 1994a).

Hearings

Hearings, in the ADR sense, are informal dispute resolution forums in which a "hearing officer" is designated under an appropriate administrative authority such as a city ordinance or a Federal statute. An informal meeting is conducted to determine if an ordinance or rule is applicable or has been violated. This definition of hearing differs from a "hearing" held by an administrative law judge (ALJ) for an organization such as the IBLA. Hearings presided by an ALJ are generally part of the formal administrative adjudicative process established in Title 5, USC, and these hearings are one of the two processes described by the ADR Act as increasingly cumbersome and inefficient, the other is the courts.

There are other approaches to hearings. One example of an ADR type hearing is the procedure prescribed in a Boise, Idaho, city ordinance to determine if an animal is "vicious" as described in city ordinance. A determination of viciousness carries sanctions and insurance requirements for the owner of the animal. The decision of the hearing officer using this ordinance is appealable to the district magistrate court. Another example of a hearing is a provision in the Federal statutes that allows a Federal employee to challenge a ruling made by an administrative officer to garnish an employee's wages for the recovery of a debt owed to the Federal Government. The decision of the hearing officer in this case is binding on the government but not the individual. Hearings of this nature might be classified as arbitrations if Mentschikoff's (1961) definitions were applied (see arbitration section).

Factfinding

Factfinding or an inquiry is a process in which a neutral third party is retained by the parties in dispute or appointed by an appropriate authority to gather appropriate evidence to determine the facts (Sander, 1975). Factfinding is advisory and nonbinding, but the factfinder can be asked to provide recommendations to the parties. Factfinding is often preliminary to labor-management negotiations between parties such as teachers and school boards. Factfinding can be a powerful inducement for settlement, especially when the appointed factfinder commands the respect of the parties and other observers of the dispute. The appraisal or recommendations made by the independent factfinder are often difficult for parties to reject. In addition, a factfinder can be particularly valuable when there is a wide disparity in the bargaining power of the parties (Sander, 1975).

Early Neutral Evaluation

Early neutral evaluation is described by DOJ's Guidance for the Use of ADR for Litigation in the Federal Courts (Department of Justice, 1992). This guidance was published to expand on President Bush's Executive Order on Civil Justice Reform, EO 12778 dated October 23, 1991. It is "an informal process, whereby the parties or the court selects a third-party neutral to investigate issues and submit a report or testify in court." The neutral helps parties develop a discovery plan, identify areas of agreement and disagreement, explore settlement opportunities, or offers an overall evaluation of the case. The procedure is nonbinding and, generally, the results are not admissible in court. This procedure looks a lot like a variation of factfinding, although the guidelines specifically identify factfinding as a separate procedure. This is an example of the many variations in terms and procedures found under the ADR umbrella. It is essential that parties in a dispute and their representatives/advisors understand the differences in procedures.

Mini-trials

Mini-trials are voluntary, private, and generally nonbinding procedures (Ury and others, 1989; Harter, 1987). Informal summaries of the opposing parties' case are presented to a jointly selected moderator or neutral advisor. Retired judges frequently are used as the neutral advisor. Mini-trials are conducted in the presence of high-level management representatives who have settlement authority. The purpose is to reveal the theories, strengths, and weaknesses of opposing positions to the parties as an aid to resolve the dispute. The neutral advisor may or may not give opinions to the parties about the strengths and weaknesses of their case. Mini-trials have been used primarily between disputants in commercial cases and have been used successfully by the U.S. Army Corps of Engineers (Edelman and others, 1989; Harter, 1987). Mini-trials may have future potential in the administrative adjudication processes established by each agency. For example, the Department of the Interior's proposed policy for ADR announced in the Federal Register on June 13, 1994, specifically mentions using min-trials within the agency. The most probable use would be by administrative law judges in the Office of Hearings and Appeals.

Private Judges or "Rent a Judge"

Private judges or Rent-a-Judge is a fairly new innovation offered by private dispute resolution firms and some courts (Lovenheim, 1989). Retired judges hear cases that otherwise would have gone to a real court. Parties in dispute agree in advance to accept the decision as if it were a real court decision. Courts will sometimes, at the request of the parties, appoint a referee to preside over a private trial. The private judge's decision has the same force and effect as a decision by the court. Advantages in the private judge programs are speed, privacy of the proceeding, and the ability to select a judge who has expertise in the disputed matter. The parties are responsible for costs (Lovenheim, 1989).

Summary Jury Trial

The summary jury trial is a court-annexed, court-run program (Lambros and Shunk, 1980). The purpose of a summary jury trial is to give the parties in dispute a peek at how a jury might decide their case without going through the expense and time required for a full trial before a jury. The jury is selected from the normal panel of jurors available to the court.

The summary jury trial was pioneered by Judge Thomas D. Lambros of the U.S. District Court for the Northern District of Ohio (Lambros and Shunk, 1980). It is a short proceeding, generally one-half to one day, in which attorneys for the parties in a dispute are each given a short period, about an hour each, to summarize their case before the jury. Introduction of evidence is limited and witnesses normally are excluded from the proceeding. After the attorneys complete their presentations, the judge gives the jury a brief explanation of the law after which the jury then goes into deliberation. The jury gives a consensus opinion or, if they are not in agreement, the views of each member are given. Jury verdicts are advisory only, unless the parties have agreed to abide by the decision of the jury. One advantage of a summary jury trial is that it gives parties who cannot resolve a dispute by other means their day in court without the cost of a full trial (Lambros and Shunk, 1980).

An example of the value of summary jury trials was evident when a 2 day summary jury trial conducted by a Federal judge for the U.S. District Court for New Mexico in 1990 resolved a multi billion dollar antitrust suit that involved a lease agreement for 300 million tons of coal. The court action had been going on since 1981 at a cost of $60 million in pretrial expenses and trial costs were estimated to cost at least as much. Judge Lee R. West, who conducted this summary jury trial, has conducted 117 such trials; settlement was reached in all but 38 cases (Alternative Dispute Resolution Report, 1990).

Ombudsman

An ombudsman can be appointed by ordinance or statute, an association, a particular business, a Federal agency, or by a number of other means. The ombudsman generally gains power and authority through personal ability to gain trust and to solve problems and disputes among members within an organization or community through the support of the officer who appointed the ombudsman (Sander, 1975). The ombudsman serves as an investigator, red tape cutter or facilitator for complaints, questions, or issues brought by clients, users, or employees of the ombudsman's employer. An ombudsman generally serves by appointment and in most cases generally is not a true neutral.

II. DEFINITIONS FOUND IN 5 U.S.C. 551 AND 552.

ALTERNATIVE DISPUTE RESOLUTION (ADR): The ADR Act defines alternative dispute resolution as "alternative means of dispute resolution means any procedure that is used, in lieu of an adjudication as defined in section 551 (7) of this title, to resolve issues in controversy, including but not limited to, settlement negotiations, conciliation, facilitation, mediation, factfinding, mini-trials, and arbitration, or any combination thereof."

ADJUDICATION: Section 551 (7) states "`adjudication' means agency process for the formulation of an order."

THE ADMINISTRATIVE DISPUTE RESOLUTION ACT OF 1996 : Public Law 104-320, Nov. 15, 1990 to authorize and encourage Federal agencies to use mediation, conciliation, arbitration, and other techniques for the prompt and informal resolution of disputes, and other purposes.

ADMINISTRATIVE PROGRAM: An administrative program includes a Federal function which involves protection of the public interest and the determination of rights, privileges, and obligations of private persons through rule making, adjudication, licensing, or investigation, as those terms are used in the 1990 ADR Act.

AGENCY: Agency means each authority of the Government of the United States, whether or not it is within or subject to review by another agency, but does not include the Congress, the courts of the United States, the governments of the territories or possessions of the United States, the government of the District of Columbia or others as listed in 5 U.S.C. 551 (1).

AWARD: Award means any decision by an arbitrator resolving the issues in controversy.

DISPUTE RESOLUTION COMMUNICATION: Dispute resolution communication means any oral or written communication prepared for the purposes of a dispute resolution proceeding, including memoranda, notes or work product of the neutral, parties or nonparty participant: except that a written agreement to enter into a dispute resolution proceeding or final written agreement or arbitral award reached as a result of a dispute resolution proceeding, is not a dispute resolution communication.

DISPUTE RESOLUTION PROCEEDING: Dispute resolution proceeding means any process in which an alternative means of dispute resolution is used to resolve an issue in controversy in which a neutral is appointed and specified parties participate.

IN CONFIDENCE: In confidence means, with respect to information, that the information is provided (a) with the expressed intent of the source that it not be disclosed or (b) under

circumstances that would create the reasonable expectation on behalf of the source that the information will not be disclosed.

ISSUE IN CONTROVERSY: Issue in controversy means an issue which is material to a decision concerning an administrative program of an agency, and with which there is disagreement between the agency and persons who would be substantially affected by the decision.

LICENSE: License includes the whole or a part of an agency permit, certificate, approval, registration, charter, membership, statutory exemption or other form of prevention.

LICENSING: Licensing includes agency process respecting the grant renewal, denial, revocation, suspension, annulment, withdrawal, limitation, amendment, modification, or conditioning of a license.

NEUTRAL: Neutral means an individual who, with respect to an issue in controversy, functions specifically to aid the parties in resolving the controversy.

ORDER: Order means the whole or part of a final disposition, whether affirmative, negative, injunctive, or declaratory in form, of an agency in a matter other than rule making but including licensing.

PARTY: Party means for a proceeding with named parties includes a person or agency named or admitted as a party, or properly seeking and entitled as of right to be admitted as a party, in an agency proceeding, and a person or agency admitted by an agency as a party for limited purposes, and for a proceeding without named parties, a person who will be substantially affected by the decision in the proceeding and who participates in the proceeding.

PERSON: Person includes an individual, partnership, corporation, association, or public or private organization other than an agency.

ROSTER: Roster means a list of persons qualified to provide services as a neutral.

RULE MAKING: Rule making means agency process for formulating, amending, or repealing a rule.

RULE: Rule means the whole or part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency and includes the approval or prescription for the future of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services or allowances therefor or

of valuations, costs, or accounting, or practices bearing on any of the foregoing.

REFERENCES

Administrative Conference of the United States. Implementing the ADR Act: Guidance for Agency Dispute Resolution Specialists. Washington, D.C., February, 1992.

Administrative Dispute Resolution Act. 1990. Act of November 15, 1990. Public Law 101-552, 104 STAT 2736, 1990.

---. Federal Administrative Procedure Sourcebook, Statutes and Related Materials. 2d.(Office of the Chairman), Washington, D.C., 1992.

Alternative Dispute Resolution Report. "Two-Day SJT Settles Antitrust Action That Cost $60 Million Over Nine Years." 9. 1990.

---. "Forest Service Considers Mediation after Resolving Timber Sale Dispute." 23. 1988.

Amy, Douglas J. "Environmental Dispute Resolution, The Promise and Pitfalls" in Vig, Norman J., and Michael E. Kraft. Environmental Policy in the 1990's. Washington, D.C.: CQ Press, 1990.

Arbitration Journal. "White House Bill Advocates use of ADR." 2. 1992.

Balser, Roy P. ed. "Notes For A Law Lecture, 1 July 1850?" Collected Works of Abraham Lincoln. 1953.

Behan, Richard W. "The Myth of the Omnipotent forester." Journal of Forestry 64.6 (1966): pp. 398-407.

Benjamin, Robert D. "The Physics of Mediation: Reflections of Scientific Theory in Professional Mediation Practice." Mediation Quarterly 8.2 (Winter 1990), pp. 91-112.

Bolle, Arnold W. Land and Resource Planning in National Forests. Eds. Wilkinson, C. F., and H. M. Anderson. Covelo, California: Island Press, 1987

Bruff, Harold H. "Public Programs, Private Deciders: The Constitutionality of Arbitration in Federal Programs." The Texas Law Review 1 December 1989: 1-109. The University of Texas Law School.

Bursey, David. "Alternative Dispute Resolution in Regulatory Proceedings - Perspectives

from the Canadian Experience." Lecture notes. Fifth Annual Northwest Alternative Dispute Resolution Conference. University of Washington School of Law, September 16, 1995.

E. When is ADR Appropriate

INDICATORS: WHEN IS USING ADR APPROPRIATE

An important initial step in alternative dispute resolution (ADR) is determining when the use of ADR is appropriate. Some disputes are not suitable for resolution through the use of ADR and others are "ripe" for resolution depending on the specific stage of the dispute. Some disputes that involve fundamental questions of constitutionality or deeply held values may never be ready for resolution through the use of an ADR process. Many disputes that do not fit in the fore-mentioned categories also may not be "ripe" for an ADR process. In some cases, the debate over an issue is so fractious that the parties simply are not ready to come into substantive negotiations with other parties. Disputes of this type may become suitable if, and when, the parties to the dispute become weary of the fight, run out of money, or have other events that cause a change in their willingness to engage in substantive negotiations. Gaging the mood of a dispute is fundamental to an agency manager's decision to use, or propose the use of, an ADR process.

It can be helpful to obtain the services of a neutral ADR practitioner to assist management in assessing the willingness of the parties to engage in an ADR process. This is the vital assessment phase of the convening process which is addressed in Section I. Convening an alternative dispute resolution event.

Some of the key factors that agency manager's should look at in their initial situation assessment are:

1. Are the stakeholders knowledgeable about ADR? BLM can substantially improve stakeholder knowledge by following the training guidelines in the Training Appendix of the Strategic Plan.

2. Has the agency used ADR (successfully or unsuccessfully) for similar disputes? Can lessons learned be applied to an ADR assessment for the present dispute? Past successful ADR events are an obvious benefit, and past unsuccessful ADR events are not always looked upon solely as disasters. Research shows that most parties to ADR events that were not successful in resolving a specific dispute also felt that some benefit was gained from participating in the ADR process.

3. Can the issues in dispute be identified with sufficient clarity to allow the parties to negotiate successfully a resolution of their differences? Absolute clarity is not essential since those issues thought to be clear, often change in focus and importance after the ADR process has begun.

4. Do you know who the stakeholders are; and if not, is it likely you will be able to identify the players early in the convening process? An unidentified stakeholder who is not included is a potential agreement buster.

5. Do you know the spokespersons for each faction of a dispute? Again absolute knowledge is not critical to making a decision about using an ADR process, but some clarity is essential early in the convening process. Spokespersons can change or evolve after the commencement of an ADR event.

6. Do you have enough time for the ADR event to be conducted? It takes time to convene an ADR event and for the parties to conduct their negotiations. Time requirements vary significantly. Experience in using ADR processes can reduce the time required to convene and conduct an ADR event. Agency experience using ADR for various common disputes, probably has generated general time patterns, however, keep in mind, each dispute will have its own time requirement. Time requirements are not necessarily barriers to using an ADR process. Deadlines can assist the parties substantially in reaching resolution, providing the minimum amount of time needed to conduct an adequate assessment, convening the process, and conducting negotiations is available. All ADR events need to have reasonable time lines established.

7. Do you suspect underlying issues are the real source of the dispute? It is not uncommon for a party in a dispute to present one issue as the basis of the disagreement, when, in reality, there are other concerns that are the real basis for the dispute. The mediation process is particularly useful in identifying and resolving underlying issues.

8. Are one or more parties obviously tiring of the conflict or adversarial process?

9. Do you have a good relationship and level of trust on most matters, but a real dispute over an issue has reared its ugly head?. Negotiation, mediation, and facilitation processes are particularly suited to the maintenance of good relations between parties when it is to their benefit to maintain a good working relationship.

10. Has one or more of the parties suggested or recommended that an ADR process be used? Knowledge about ADR processes is growing throughout the country, and it is likely that other stakeholders may suggest the use of an ADR process to prevent or resolve a dispute.

11. When the entire Congressional delegation from your state sends you a letter suggesting you have a public participation problem and recommend you contract for the services of a third-party neutral to resolve the issues.

Survey of Potential Applications for ADR in BLM

Attached are the results of a survey of Bureau of Land Management (BLM) offices that was conducted by the Washington EEO staff in 1994. The results show potential areas where alternative dispute resolution processes could be used in BLM. This list is not a complete list of potential uses of ADR and is offered as starting point.

UNITED STATES DEPARTMENT OF THE INTERIOR

Bureau of Land Management

ALTERNATIVE DISPUTE RESOLUTION PROGRAM PLAN

Survey of Potential Applications
for Alternative Dispute Resolution (ADR) Methods
in the Bureau of Land Management (BLM)

Washington, D.C.
January 1995

Attachment

Survey of Potential Applications for Alternative Dispute Resolution (ADR) Methods in the Bureau of Land Management (BLM)

NOTE: This conflict inventory was compiled in January, 1995, from responding Washington Office, State, and Center Directors as requested by Instruction Memorandum No. 95-44, Survey of Potential Applications for Alternative Dispute Resolution Methods in the Bureau of Land Management.

Contents

Cadastral Survey	1
Conveyance Management	2
Equal Employment Opportunity	2
Forestry Program	3
Hazardous Materials Management	3
Human Resources Management	4
Lands Program	4
Mineral Exchange Appraisals	5
Minerals Program	6
Oil and Gas Program	7
Planning Management	8
Procurement Management	8
Property Accountability	9
Public Lands Access	9
Range/Grazing Management	10
Realty Program	10
Recreation Site Management	11
Resource Use and Protection	11

Program Title:	**Cadastral Survey**
Typical Disputes:	Cadastral Survey (CS) is the official survey arm of the Federal Government for all public lands. No subdivisions of public lands may be conveyed or disposed of until an official CS survey is completed and accepted. The types of survey disputes include land location, total area, and method of survey.
Typical Disputing Parties:	Individual allottees entitled to lands under Native Allotment Act of 1906, 1872 Mining Law, and Homesteading; the State of Alaska, Native Corporations, and Tribes. Federal land management agencies such as Bureau of Land Management (BLM), the Forest Service, the National Park Service, the Fish and Wildlife Service, and the Military.
Current Resolution Procedures:	CS uses a four-step resolution process. For individual allottees, CS reviews all actions from initial application to final survey. CS negotiates all possible legal resolutions. In the case of Native allottees, the Bureau of Indian Affairs often participates in negotiations. Informal on-site hearings are held and post-hearing reports are provided. On-site village meetings are conducted, and written legal agreements are provided to disputants. Coordination, negotiation, dispute resolution, and fact-finding techniques are utilized in order to compose legal land title recovery documents.
Applicability of ADR Methods:	ADR methodology already employed in this program area.

Program Title:	**Conveyance Management**
Typical Disputes:	Issues related to informal, evidentiary, fact-finding hearings; Native village agreement development/negotiation/dispute resolution; individual case projects and discretionary actions (i.e., title recovery).
Typical Disputing Parties:	Native Corporations; State government personnel; legal services representatives, other Federal agencies; Office of the Solicitor.
Current Resolution Procedures:	Informal hearings; village meetings; coordination; negotiation, conciliation, fact-finding.
Applicability of ADR Methods:	ADR techniques are appropriate for this workload.

Program Title:	**Equal Employment Opportunity**
Typical Disputes:	Illegal employment discrimination based on factors such as age, color, physical or mental handicap, national origin, race, religion, sex, as well as reprisal for participation in an Equal Employment Opportunity (EEO) administrative process protected by law; disparate impact or treatment; sexual harassment.
Typical Disputing Parties:	Members of protected groups specified by Title VII, Civil Rights Act of 1964 and subsequent related legislation.
Current Resolution Procedures:	Individuals who allege unlawful employment discrimination are required to undergo EEO counseling prior to filing a formal Complaint of Discrimination which is investigated and adjudicated by the agency and subject to appellate review by the EEO Commission. Complainants have options for litigation in U.S. District Court.
Applicability of ADR Methods:	ADR methods appear to be applicable to the EEO program at all stages of the complaints process.

Program Title:	**Forestry**
Typical Disputes:	Contract disputes involving rehabilitation or slash removal, or "view shed" disturbance; environmental concerns over the sale of lumber.
Typical Disputing Parties:	BLM agents and contractors; local land owners; large and small environmental groups.
Current Resolution Procedures:	Large environmental groups typically file protests with the Interior Board of Land Appeals (IBLA), interrupting the removal time for a period of up to two years. Informal discussions, one-on-one negotiation with smaller and/or local groups, contractors, and landowners have resolved many protests at the local level.
Applicability of ADR Methods:	Arbitration of protest by large environmental groups could prove more effective than present IBLA procedures. Other ADR methods already have been employed in resolving other disputes.

Program Title:	**Hazardous Materials Management**
Typical Disputes:	Contract disputes relative to procurement type actions and hazardous waste removal contracts.
Typical Disputing Parties:	BLM personnel; contractors; vendors.
Current Resolution Procedures:	The file is reviewed to determine if the dispute/protest is filed with Washington Office Procurement or the General Accounting Office. Time frames are specified in the Federal Acquisition Regulations Part 33, and procedures are initiated with a formal file review to make a determination.
Applicability of ADR Methods:	Although contract administration procedures include clearly defined contract resolution procedures, ADR methods may be used when the contracting officer has authority to settle the issue.

Program Title:	**Human Resources Management**
Typical Disputes:	Performance standards and ratings; availability of training opportunities, classification of positions; pay; personnel actions; cash and honor awards; qualifications ratings and reviews; challenged disciplinary actions and adverse actions; reasonable accommodation determinations, and labor-management relations issues.
Typical Disputing Parties:	Employees, supervisors, managers, applicants for employment; union management.
Current Resolution Procedures:	Cooperation/negotiation between supervisors and employees; statutory appellate processes, such as administrative grievance/Merit Systems Protection Board appeals; management-directed review of decisions or actions; mediation, arbitration, negotiated grievance procedures.
Applicability of ADR Methods:	ADR methods applicable where statutory limitations permit and where breakdowns in communication are a factor in the dispute.
Program Title:	**Lands**
Typical Disputes:	Denial of applications for right of way, permits, Recreation for Public Purposes; land exchange process; appraisal values; decision precluding use activities; trespass; damage settlement; review of land use plans.
Typical Disputing Parties:	Landowners; permittees; applicants; other land "users;" agents of the BLM.
Current Resolution Procedures:	Various forms of informal discussion, review, and appeals processes (locally and through the IBLA). Arbitration has also been used.
Applicability of ADR Methods:	ADR methods would be helpful in order to resolve issues such as these early in the dispute process.

Program Title:	**Mineral Exchange Appraisals**
Typical Disputes:	Issues involving mineral exchange property appraisals.
Typical Disputing Parties:	Proponents of the exchange; Federal mineral economic specialists; Federal program managers.
Current Resolution Procedures:	Information and appraisals are exchanged in a negotiated attempt to find the most technically correct estimated market value.
Applicability of ADR Methods:	Currently used methods, such as information exchange and negotiation, are recommended ADR procedures.
Program Title:	**Property Management**
Typical Disputes:	Bidders for surplus property who complain that property is not as functional as anticipated.
Typical Disputing Parties:	Employees, contractors, survey board members, reviewing officials.
Current Resolution Procedures:	Disputes usually settled through negotiation. If conditions are not clear, bidder receives the option of returning item.
Applicability of ADR Methods:	Negotiation has been successfully applied in these cases.

Program Title:	**Minerals**
Typical Disputes:	Mining claimants do not provide proof of labor/holding fees on a timely basis. Trespass situations; mining operations which adversely impact adjacent landowners; mining operation not reclaiming land appropriately after mineral removal; and disapproval of applications to drill for oil and gas. Policy issues related to specific permits and approval actions which may involve more than one management level of the organization. Issues may include State coordination or disputes over technical adequacy; claim disputes; mining in recreational areas; validity disputes.
Typical Disputing Parties:	Mining claimants and operators; claimants and other claimants; claimants and BLM employees; BLM agents and others; private parties removing mineral material from private or government land; representatives of environmental groups; land managers; other public lands users.
Current Resolution Procedures:	Varies with the particular situation. Informal resolution or specified regulatory and/or appellate procedures are employed. Many decisions are appealable through the IBLA.
Applicability of ADR Methods:	ADR methods are potentially applicable for certain disputes which have not reached a formal regulatory process, i.e., administrative appeal or legal action. Some cases (i.e., those involving claimants who do not provide proof of the timely payment of labor/holding fees) would not be appropriate for ADR, because those decisions are non-negotiable based on the law. Other situations could benefit from the use of ADR methods.

Program Title:	**Oil and Gas**
Typical Disputes:	Environmental Impact Statement (EIS)/Resource Management Plan complaints about EIS process; assessing and mitigating impacts; mineral development disputes between extractive industries; disputes involving environmental groups versus the oil and gas industry; issues involving bonding, unit approvals, monthly/quarterly well reports, and lease suspensions; drainage and diligence drilling requirements; wells proposed for development in mining areas.
Typical Disputing Parties:	Industry (oil and gas and mining) representatives and operators; applicants; general public; agricultural interests; recreation and environmental groups; other Federal, state and local agencies; disciplines within the BLM (i.e., Resource Management Team members such as geologists, engineers, land law examiners, and Resource Area personnel(i.e., environmental scientists, wildlife specialists, managers).
Current Resolution Procedures:	Varies with the particular situation. Comments are solicited in some cases, and unilateral decisions made in others. Informal mediation is sometimes attempted, but it is generally determined that the first company initiating development a contested parcel of land has prior rights. Court action is required in some cases. BLM generally solicits comments from both sides of a dispute but makes a final decision based on the original proposed action approved by the BLM. Non-BLM disputants are generally not conciliatory and tend to maintain their initial positions.
Applicability of ADR Methods:	ADR methods are potentially useful in resolving EIS/RMP conflicts, and negotiation/mediation skills could be applied in land use decisionmaking, creating win-win situations and improving relations between groups, reducing conflicts, and minimizing the number of disputes with which management must deal. Some ADR techniques are now being employed, but increased application is appropriate.

Program Title:	**Planning**
Typical Disputes:	Concerns raised by the external public regarding the planning process.
Typical Disputing Parties:	External public lands users; land and facility managers.
Current Resolution Procedures:	Various, based on the individual situation.
Applicability of ADR Methods:	Yes. With the increase in public involvement in the planning process, mediation skills are becoming a necessity.

Program Title:	**Procurement Management**
Typical Disputes:	Claims and disputes arising from the administration of contracts.
Typical Disputing Parties: officers.	Contractors; vendors; BLM contracting
Current Resolution Procedures:	A formal process is established under the Contract Disputes Act of 1978, and is implemented in the Federal Acquisition Regulations (FAR). Issues not resolved between the contractor and the Contracting Officer may be raised to Boards of Contract Appeals or the U.S. Court of Federal Claims.
Applicability of ADR Methods:	The FAR includes guidance on using ADR procedures, and the Federal Acquisition Streamlining Act of 1994 provides further encouragement to use ADR procedures with small businesses. ADR methods may be used at any time that the contracting officer has authority to settle the issue in controversy and can be applied to a portion of a claim.

Program Title:	**Property Accountability**
Typical Disputes:	Issues related to responsibility for lost or missing government property; inventory losses or movement; the assignment of new property.
Typical Disputing Parties:	Property Survey Boards; employees; custodial officers; property requisitioners.
Current Resolution Procedures:	Board of Survey investigates the circumstance of loss and recommends assignment of pecuniary responsibility; searches are conducted for missing property; policy statements issued on accountability issues.
Applicability of ADR Methods:	The Board of Survey procedure is mandated by regulation.

Program Title:	**Public Lands Access**
Typical Disputes:	Access locations; cost of access.
Typical Disputing Parties:	Public lands users; Federal, State, and
County	land and facility managers.
Current Resolution Procedures:	Various, based on the individual situation.
Applicability of ADR Methods:	Yes. Mediation skills are becoming a necessity.

Program Title:	**Range/Grazing Management**
Typical Disputes:	Livestock permittees and others regarding implementation of grazing decisions/-agreements, often related to loss of grazing privileges. Other issues: threat of deteriorating rangeland conditions and habitat damage to threatened/-endangered species (plant or animal); sub-leasing, trespass; grazing in wilderness areas, and riparian area conflicts.
Typical Disputing Parties:	Livestock permittees and "other affected interests" as defined in 43, CFR; allottees and other public lands users; allottees and BLM employees.
Current Resolution Procedures:	Varies, depending upon the individual situation. Complaints or appeals are received primarily in one of three ways: informal, formal, and Congressional inquiry. There is the Coordinated Resource Management Plan which is a national plan to address related issues that cannot be resolved informally.
Applicability of ADR Methods:	ADR is potentially applicable. Some offices already employ some methods, i.e., conciliation and facilitation.

Program Title:	**Realty**
Typical Disputes:	Access and easement issues; appraised land values; land exchanges.
Typical Disputing Parties:	Applicants and other land users; applicants and BLM employees.
Current Resolution Procedures:	Varies, depending upon the individual situation.
Applicability of ADR Methods:	ADR methods are sometime applied to these types of disputes but the potential for their application is much greater.

Program Title:	**Recreation Site Management**
Typical Disputes:	Issues related to the types of facilities allowed on managed lands, and the level of management imposed at recreational sites; competing priorities; allocation of a limited resource.
Typical Disputing Parties:	Public lands users; lands and facility managers; groups promoting handicap accessibility.
Current Resolution Procedures:	Various, based on the individual situation.
Applicability of ADR Methods:	Yes, to improve communication.

Program Title:	**Resource Use and Protection**
Typical Disputes:	Concerns regarding "what" should be protected and from whom it should be protected.
Typical Disputing Parties:	Public lands users; land and facility managers, Native American tribal organizations which identify an interest.
Current Resolution Procedures:	Various, based on the individual situation.
Applicability of ADR Methods:	Yes. ADR methods have potential for improving communication between parties.

Section G. Procuring Neutrals

Procurement Guidelines

Competitive requirements for hiring third-party neutrals was made substantially easier by passage of Public Law 104-320, The Administrative Dispute Resolution Act of 1996. The Act states: EXPEDITED HIRING OF NEUTRALS FOR USE IN ADMINISTRATIVE DISPUTE RESOLUTION:

An exemption from the Competition in Contracting Act, 41 U.S.C. 253(c)(3)(C), (CICA) has been granted by statute for the procuring of neutrals in administrative dispute resolution.

Federal Acquisition Regulation (FAR) Part 6 "Competition Requirements: does not yet have the specific language that includes "Neutrals." As it stands today, reference is only to the procuring of experts.

If you have any questions, please contact your local procurement staff (see attached list of BLM procurement contacts) or John Sherman, Procurement Analyst, at he National Business Center, (303) 236-9441.

Note to Procurement Request Initiators:

When writing your justification, FAR Part 6.303 "Justifications" for use of "other than full and open competition," please cite both the Public Law 104-320, Administrative Dispute Resolution Act of 1996 and FAR Part 6 "Competition Requirements" 6.302-5 "Authorized or Required by Statute."

This guidance was sent via e-mail to all BLM procurement offices by John Sherman, BLM National Business Center, Denver Federal Center, on March 18, 1997.

Subject: Procurement Issues Regarding ADR

Procurement Analysts;

Last Fall, I was asked to participate on the Natural Resources Alternative Dispute Resolution (ADR) team for the development of a Bureau-wide Strategic Plan concerning use of ADR and Tool Kit for field use.

As a result of this participation, I wrote an IB (BC-048 dated August 8, 1996) issued to all Administrative Personnel describing when ADR should be used.

In addition, I provided an instruction sheet (see attachment g.wpd) which discusses the expedited hiring of "Neutrals" for use in ADR, which has been included in the ADR Tool Kit. The Tool Kit has been released in "draft" form and final approval is expected in the near future.

Along with this expedited hiring allowance comes new opportunities for the acquisition/procurement of these "Neutrals" . These new opportunities or freedoms are essentially an exemption from CICA or the Competition in Contracting Act, 41 U.S.C. 253(c)(3)(C), specifically.

In this instruction sheet, I've stated that the BLM employees who desire to use this expedited hiring allowance and the resultant exemption from CICA should contact there local procurement staff. I also stated that they must justify in writing per FAR 6.303 "Justifications" why they believe their action falls under this exemption and site the specific exemption.

Even with the instructions that I've shown you above, it would be my recommendation to notify your State's field personnel that they should coordinate with you as soon as they have began thinking of the hiring of "Neutrals". As always, the specific acquisition/procurement always seems to run a little smoother for all parties concerned (Acquisition Office/Project Office) when advance notice has been given to the Acquisition Staff.

I've also attached a few of the other sections of the Tool Kit for your information. The file a.wpd refers to other BLM ADR Programs (you might want to read the second paragraph referring to Procurement and Contracting). Lastly, attachment (adr-mktp) refers to the ADR Strategic Plan.

If you have any questions please contact me at (303) 236-9441.

Thanks, John

Section H. Federal Advisory Committee Act

Federal Advisory Committee Act

Provisions of the Federal Advisory Committee Act (FACA) need to be understood by BLM employees in the alternative dispute resolution (ADR) context, particularly when negotiation and facilitation are used to gather public input for decisionmaking, as in the land-use planning process. ADR processes such as mediation when used to resolve a specific dispute between BLM and one or more parties are not for the purpose of obtaining advice or recommendations, even though a mediation event requires "consensus" by the parties in order to resolve the dispute. Also, the Administrative Dispute Resolution Act, Public Law 104-320, specifically allows for some ADR processes to be conducted in confidence. Even though the law permits some ADR processes to be shrouded in confidentiality, potentially adverse consequences of shielding discussions from the public should be carefully weighed.

The attached documents have been added to provide guidance for BLM employees to evaluate when FACA is a factor. Since ADR processes are flexible in their application, any doubts about the applicability of FACA should be discussed with the appropriate Solicitor's office. FACA violations can generally be avoided by observing two principles; keep the doors open to anyone for all meetings which are part of a collaborative decisionmaking process initiated by BLM, and insure that the public is adequately advised of the time, place and intent of the meetings.

Steering Clear of FACA Problems

Confusion about the Federal Advisory Committee Act (FACA) is widespread these days throughout BLM. At a time when we're being encouraged more than ever to collaborate and involve the public in our decisions, along comes a new emphasis on FACA and suddenly, much of what we planned or have done in the past appears to be in violation of the law.

Nobody wants to violate the law and yet we need to involve the public. FACA and decisions by the courts do spell out some situations where the law does not apply; that's the good news. BLM managers and specialists need to be as familiar with circumstances where FACA is not applicable as they are with when FACA is in effect. Here's a summary that might help you recognize when FACA doesn't fit. We've underlined parts that are especially important to note.

1. First, some definitions taken right from FACA itself. The term "Advisory Committee" means any committee, board, commission, council, conference, panel, task force or other similar group, or any subcommittee or other subgroup thereof (hereafter referred to as committee) which is:

A. Established by statute or reorganization plan,

B. Established or utilized by the President,

C. Established or utilized by one or more agencies, in the interest of obtaining advice or recommendations for the President or one or more agencies or officers of the Federal Government, except that such term excludes ... any committee which is composed wholly of full-time officers or employees of the Federal Government.

The last sentence provides the first instance where FACA is not applicable: to any group wholly composed of federal employees. Additionally, recent interpretations of FACA hold that groups composed of state or tribal government employees are also exempt from FACA.

2. One-on-one meetings between BLM and an individual, regardless of who initiates the meeting, are not violations of FACA. A meeting initiated by a group for the purpose of expressing the group's view is not considered a violation of FACA as long as the group was not formed by the federal agency and is not used recurrently as a preferred source of advice or recommendations.

3. If the meeting is solely to exchange facts or information and not reach a consensus or receive recommendations from representatives of a variety of groups, then FACA doesn't apply.

4. Meetings with permittees are generally not subject to FACA. You have no worries if the meeting is held to talk about operational procedures. If the permittees

seek to give you consensus-based recommendations, then you're approaching the fine line of FACA and need to be careful.

5. If BLM is invited to a meeting by an outside, unsolicited pre-existing group, then FACA is not a factor. The reverse of this is that if the group was formed to advise BLM on particular issues, then FACA needs to be considered.

6. If BLM invites a group of people in to receive their individual opinions, as opposed to reaching a consensus or group advice or recommendation, then the meeting is not in conflict of FACA.

7. If a contractor forms a group to receive advice or recommendations, then that group is not subject to FACA. BLM, however, cannot suggest to the contractor that the sub-group be formed.

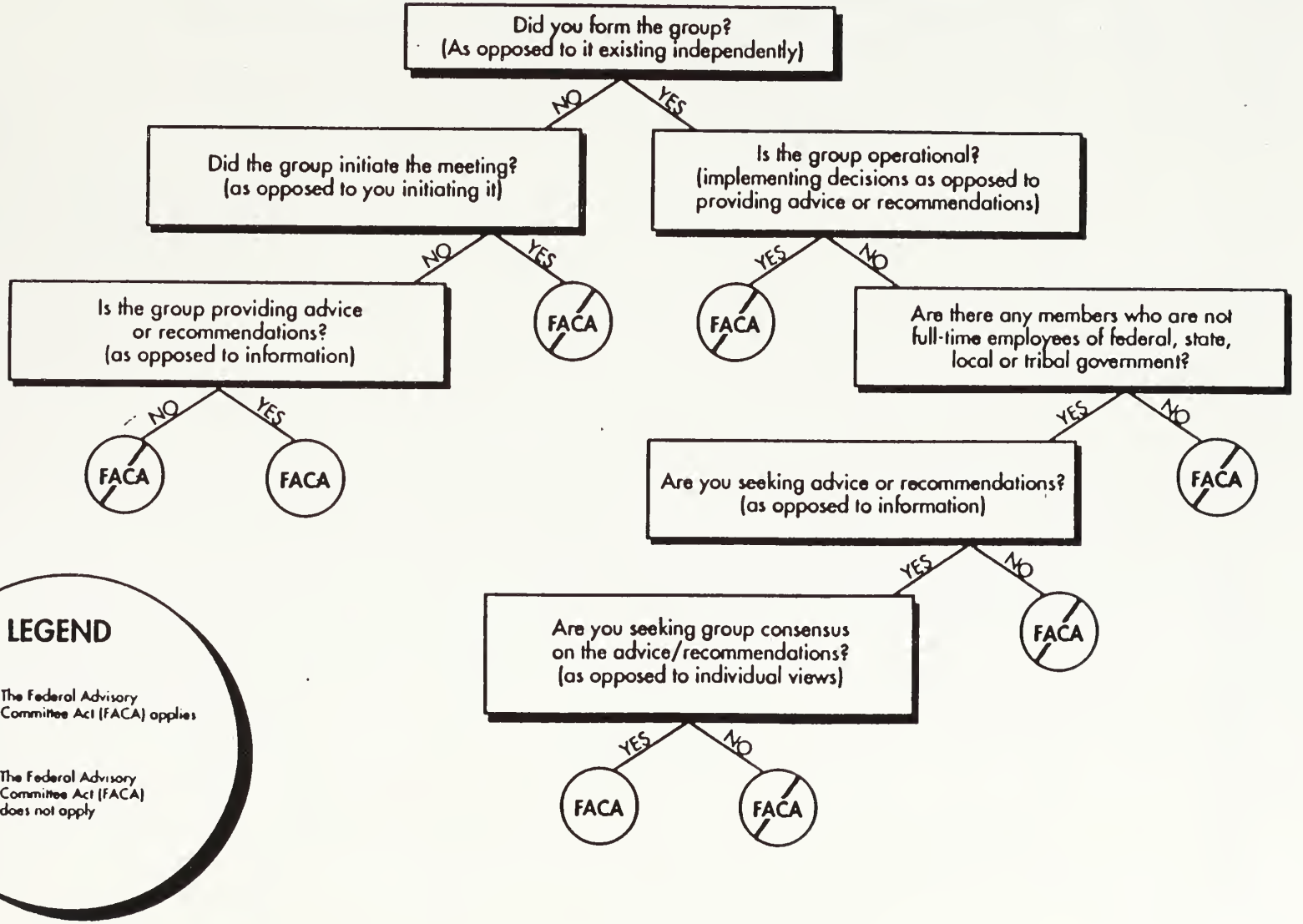
8. This is rare for BLM, but a local civic group whose primary function is to render public service to a federal program is not affected by FACA. For example, the foundations that work with individual national parks are not in violation of FACA.

9. Finally, any state or local committee, council, board, commission or similar group established to advise or make recommendations to state or local officials or agencies are not covered by FACA.

No one will go to jail for FACA violations. It is a civil law, not a criminal law. But if we are challenged on the basis of FACA and lose, it may mean tossing out months or years of work and starting over. Ignoring FACA can be costly and decrease our competency and credibility in the eyes of the public.

If any doubt exists about an activity's legality under FACA, then you should get in touch with Kenneth Sebby or Kathleen Carr at the Field Solicitor's office, 334-1911.

FACA DECISION TREE



THE FEDERAL ADVISORY COMMITTEE ACT - HOW IT AFFECTS THE DEPARTMENT OF THE INTERIOR'S INTERACTIONS WITH THE PUBLIC[1/]

I. Introduction.

Congress passed the Federal Advisory Committee Act ("FACA") in 1972 to control the growth and operation of the numerous boards, committees, commissions, councils, and similar groups that had been established to advise officers and agencies in the Executive Branch of the Federal Government. FACA's stated purposes are to eliminate unnecessary advisory committees, limit the formation of new committees to the minimum number necessary, keep the functions of the committees advisory in nature, hold the committees to uniform standards and procedures, and keep the public informed of their activities. 5 U.S.C. Appendix § 2. To guard against biased proposals from private interested parties, FACA procedures open to public scrutiny the manner in which many outside groups provide advice to the Federal Government.

Thus, FACA governs many of the ways agencies of the Federal Government interact with outside groups. In some instances, it is

---

[1/] This document was prepared by the Office of the Solicitor, Division of General Law. It is intended to be generic FACA guidance with only limited specific references to how the Act affects the particular programmatic concerns of the Department of the Interior's various bureaus.

clear that FACA applies to a given situation.[2] In other instances, it is equally clear that certain forms of Departmental interactions with the public are not covered by FACA. Then, there are gray areas where it is not always clear whether FACA applies.[3]

It is important to be as aware as possible of what FACA covers so that agency activities can be structured appropriately, and useful contacts and communications with outside groups and individuals can occur consistently with applicable law to the greatest extent possible. We hope that, with the information contained in this guidance, the amount of interaction with the public can be maximized, consistent with the dictates of FACA, and the likelihood that the Department will run afoul of FACA will be minimized.

II. General Principles.

An advisory committee is defined as:

---

[2] For example, as of October 1995, the Department of the Interior has approximately 111 chartered advisory committees subject to FACA. Of these committees, about 68 are required specifically by other statutes.

[3] As will be evident from the text of this document, the law under FACA is evolving. The Division of General Law has developed this guidance to address the legal ramifications of various types of interactions between the Department of the Interior and non-federal groups and individuals. There are many issues under FACA, however, for which there is as yet no legal precedent, or where the effect of the existing precedent remains unclear. Accordingly, in order to give guidance in the gray areas, we have had to use our best judgment as to how the courts would likely resolve these issues. Because of the evolving nature of the law and the absence of clear legal precedent in many areas, certain courses of action, as discussed more fully throughout this document, cannot be deemed to be risk-free.

> [A]ny committee, board, commission, council, conference, panel, task force, or other similar group, or any subcommittee or other subgroup thereof . . . which is--
>
> (A) established by statute or reorganization plan, or
> (B) established or utilized by the President, or
> (C) established or utilized by one or more agencies,
>
> in the interest of obtaining advice or recommendations for the President or one or more agencies or officers of the Federal Government . . ..

5 U.S.C. Appendix § 3(2).

In analyzing FACA issues, it may be helpful to think about advisory committees as involving three basic components:

(1) A group
(2) Established or utilized by the Executive Branch
(3) To obtain advice or recommendations for the Executive Branch.

In this context, a group that is "utilized" is a group that is organized directly by the Federal Government, or is a group that is closely tied to, or controlled largely by, the Federal Government.

Using this framework, one can describe, in general terms, the types of meetings that fall within the scope of FACA and those that do not. Attached as Appendix 1 is a "plain English" statement of general principles describing the groups and meetings that fall within and outside the scope of FACA based on the above framework. It should be emphasized, however, that this statement represents a very basic approach to FACA issues. The statement is intended only as short hand guidance and should not be used outside the context of the full discussion of FACA principles presented in this document.

III. The FACA Framework.

When a group comes within the definition of an advisory committee, FACA requires that the group be chartered, and that it operate in accordance with the terms of FACA. See Appendix 2 for the steps involved in establishing advisory committees under FACA.

FACA specifically excludes from the definition of advisory committees:

a.) any committee which is composed wholly of full-time officers or employees of the Federal Government;

b.) any local civic group whose primary function is that of rendering a public service with respect to a Federal program; and

c.) any State or local committee, council, board, commission or similar group established to advise or make recommendations to State or local officials or agencies.

5 U.S.C. Appendix §§ 3(2)(C)(iii), 4(c).

In guidelines promulgated by the General Services Administration (GSA), there are several examples of meetings or groups not covered by FACA, in addition to those explicitly exempted by the statutory language discussed above:

1.) Any committee established to perform primarily operational as opposed to advisory functions, as long as the committee's functions do not become primarily advisory. Operational functions are those specifically provided by law.

2.) Meetings with an individual.

3.) Any meeting initiated by a Federal official with more than one individual for the purpose of obtaining the advice of the individuals present and not for the purpose of using the group to obtain consensus advice or recommendations. FACA may be implicated, however, if the agency accepts the group's deliberations as a source of consensus advice or recommendations. See discussion in Part IV(D) and note 8, infra.

4.) Any meeting initiated by a group with a Federal official for the purpose of expressing the group's view, as long as the Federal official does not use the group "recurrently" as a preferred source of advice or recommendations. See discussion in Part IV(D) and note 8, infra.

5.) Meetings of two or more advisory committee or subcommittee members convened solely to gather information or conduct research for a chartered advisory committee, to analyze relevant issues and facts or to draft proposed position papers for deliberation by the advisory committee or a subcommittee of

the advisory committee. (We have interpreted this exemption as permitting non-members of the advisory committee to be on the subgroups).

6.) Any meeting with a group initiated by a Federal official for the purpose of exchanging facts or information.

41 C.F.R. § 101-6.1004.[4/]

A. General Analysis

It is important to analyze both the kind of contact anticipated and the nature of the group when scrutinizing interactions with outside groups for application of FACA. Thus, questions arising under FACA generally fall into two categories:

[4/] We note, as a measure of caution, that in 1989 the Supreme Court, in its only opinion addressing FACA, refused to defer to the GSA regulatory definition of the term "utilized" as used in FACA, because it was not issued contemporaneously with the enactment of FACA, and Congress had not authorized GSA to issue a regulatory definition of an advisory committee having the force and effect of law. Public Citizen v. United States Department of Justice, 491 U.S. 440, 465 n. 12 (1989). The Supreme Court recognized, however, that GSA was statutorily empowered to prescribe administrative guidelines, advice, assistance and guidance to advisory committees to improve their performance. Id. At least one other court has followed the Supreme Court's lead. In Ass'n of American Physicians and Surgeons, Inc. v. Hillary Clinton, 998 F.2d 898, 913 (D.C. Cir. 1993), the D.C. Circuit declined to defer to the GSA guidelines regarding exceptions from FACA on the ground that all agencies, not GSA alone, are charged with interpreting FACA.

a.) Is the anticipated interaction (e.g., a meeting) with outside groups or individuals subject to FACA?

b.) Is the group with which the agency expects to make contact subject to FACA?

Relevant to the first inquiry are factors such as the purpose of the meeting; the frequency with which such meetings are expected to occur; and whether a consensus opinion or individual views are sought. Alternatively, some situations involve determining whether an agency's interactions with loosely organized groups with ill-defined identities and internal procedures are subject to FACA. Other groups with which agencies interact are very well organized, with established memberships. Also relevant is who organized or controls the group. Factors such as these are essential to determining whether FACA applies to a given communication.

B. What Does "Established or Utilized" Mean?

FACA contains no definition for the term "established or utilized." Courts have interpreted "established" to have its ordinary meaning in the context of advisory committees; committees established by a Federal agency are created intentionally and are easily identifiable. While GSA's guidelines include a definition of "utilized", the Supreme Court in 1989 refused to defer to that

definition. See Public Citizen v. United States Department of Justice, 491 U.S. 440, 463-4 n. 12 (1989). Nonetheless, both the Supreme Court and the GSA guidelines share the common understanding that FACA applies to outside groups used by the Federal Government "in the same manner" as the Government would use Government-established advisory committees to obtain advice or recommendations. 491 U.S. at 462-63; 41 C.F.R. § 101-6.1003. That is, FACA governs the receipt of advice or recommendations from groups closely tied to the Federal Government, thereby enjoying a "quasi-public status." Thus, the Supreme Court interpreted "established or utilized" to exclude the receipt of advice or recommendations from groups not organized by the Federal Government or brought into being or controlled largely by the Federal Government.

Whether a group not organized by the Federal Government is sufficiently closely tied to the Federal Government so as to produce a "quasi-public status" leads to yet more questions as to when this test is met. FACA likely will apply, however, where a group or committee is subject to "strict management by agency officials." 491 U.S. at 461, 463; Food Chemical News v. Young, 900 F.2d 328. 332-33 (D.C. Cir. 1990). Therefore, we believe that meetings with preexisting groups that were not formed by and are not controlled by the Department (such as through funding, setting meeting agendas, or appointing members), and which have continuing

functions unrelated to these Federal advice-giving activities probably are not subject to the requirements of FACA.

It is clear that agencies have a great deal of latitude to structure their interactions with groups so as to avoid the need to charter an advisory committee under FACA. In its most recent iteration of this analysis, the Court of Appeals for the D.C. Circuit closely examined the structure and form of the groups created by the President to produce a legislative proposal for health care reform. The court held that "[s]ince form is a factor, it would appear that the government has a good deal of control over whether a group constitutes a FACA advisory committee.... In order to implicate FACA, the President, or his subordinates, must create an advisory group that has, in large measure, an organized structure, a fixed membership, and a specific purpose." Ass'n of American Physicians and Surgeons, Inc. v. Hillary Clinton, 998 F.2d 898, 914 (D.C. Cir. 1993).

Accordingly, in structuring its interactions with the public, agencies should consider all the factors a court would consider in determining whether the agency has established or "utilized" an advisory committee. These factors include: the purpose of the meeting(s); the frequency of meetings; who attends; whether participants change or remain constant over the course of multiple meetings; whether group input from participants, as opposed to expression of individual views, is an objective or result (even if

"consensus" is not obtained); and the degree of control exercised over the group.

As a result of legislation enacted in 1995, it is unnecessary to consider these factors for some meetings among Federal officials and state, local and tribal government officials.[5/] Unfunded Mandates Reform Act of 1995, Public Law 104-4, section 204(b). It is important to note that this exception, while broad, does not extend to all meetings with state, local and tribal officials. The precise scope of this limitation on FACA's reach is discussed in section IV(A), below.[6/]

[5/] As originally enacted, FACA contained no exception for meetings with states or tribes. The legislative history of FACA reveals that, of the three bills introduced in the Senate in 1971, only the first contained an express exception for meetings with state agencies. None of the ensuing bills considered, including the House and Senate bills that were sent to conference in 1972, contained a state exception. There are no recorded debates about the state exception or other indications why the exception was dropped as FACA took shape.

In 1991, a bill was introduced in the Senate to amend FACA to exclude committees composed of state or local employees meeting with Federal employees where directed by statute. This bill was never enacted.

[6/] Prior to the enactment of Public Law 104-4, courts had identified potential constitutional ramifications to our system of federalism arising from the applicability of FACA to the relationship of the Executive Branch to the states. Courts generally have avoided addressing directly such constitutional questions, however, and have not construed FACA as containing a constitutionally-required exception for meetings with states. See Aluminum Company of America v. National Marine Fisheries Service, Civ. No. 94-698-MA, D. Or., slip op. at 15 (Dec. 8, 1994); Natural Resources Defense Council v. U. S. Environmental Protection Agency, 806 F. Supp. 275, 278 (D.D.C. 1992).

IV. Does FACA Apply?

Based on the language of FACA itself, the recently-enacted Section 204(b) of Public Law 104-4, the applicable case law and the GSA guidelines, the following represents our views on the applicability of FACA to various types of interactions between Federal agencies and the public.

A. Meetings with State, Local and Tribal Officials.

Section 204(b) of the Unfunded Mandates Reform Act of 1995, Public Law 104-4, provides that FACA

> "shall not apply to actions in support of intergovernmental communications where --
>
> (1) meetings are held exclusively between Federal officials and elected officers of State, local, and tribal governments (or their designated employees with authority to act on their behalf) acting in their official capacities; and
>
> (2) such meetings are solely for the purposes of exchanging views, information, or advice relating to the management or implementation of Federal programs established

pursuant to public law that explicitly or inherently share intergovernmental responsibilities or administration.

This provision became effective on March 22, 1995. On September 21, 1995, the Office of Management and Budget issued guidelines and instructions required by section 204(c) of Public Law 104-4. These guidelines make it clear that "the exemption applies to all Federal agencies subject to FACA," and "to the entire range of intergovernmental responsibilities or administration." Further, OMB states that the exemption should be read broadly in accordance with the statute's legislative intent.

As the guidelines and instructions recognize, the new legislation clearly allows a wide range of intergovernmental meetings and communications to take place outside of FACA. Nevertheless, the statutory language raises new questions of interpretation of FACA's applicability that must be addressed. In order to ensure that intergovernmental communications are safely outside FACA, the conditions set forth in the statutory language must be met. We address each in turn.

(i) "... meetings are exclusively between ... (intergovernmental officials)." (Section 204(b)(1)).

While the inclusion of the word "exclusively" might suggest that no one other than intergovernmental officials may be present during a

meeting, such a requirement would be far more restrictive than FACA itself, which has as one of its basic tenets the importance of open meetings. We do not believe such a result was intended. We believe the statutory language can be read harmoniously with FACA, in a manner that continues to honor the plain meaning of the language, if it applies to the participants at the meeting. Accordingly, we advise that agencies should continue to open meetings to anyone, but only the participants need be intergovernmental officials.

(ii) "... elected officers (or their designated employees with authority to act on their behalf) ...." (Section 204(b)(1)).

It is likely that only a small number of meetings will be held directly between Federal officials and state, local or tribal elected officials. For all practical purposes, most regular agency consultations tend to take place with program offices of the state, local or tribal governments. We believe, consistent with OMB's guidelines and instructions, that this provision exempts such consultations from FACA. OMB has directed agencies to consult at all levels, explaining that the FACA exemption applies where the non-Federal governments are "acting through their elected officers, officials, employees . . .." Based on OMB's guidance, we do not believe it is necessary to take extraordinary steps to ascertain the delegated authority of employees of state, local or tribal offices with whom agencies consult.

(iii) "... acting in their official capacities ...." (Section 204(b)(1)).

We expect that, in most instances, state, local and tribal officials will be acting in their official capacities in meeting with Departmental employees. Where a non-Federal official is representing an entity other than his or her employer, however, such as a national association of state, local or tribal employees, this criterion may not be met (though it is possible that the non-Federal employee still may be representing his or her office.) We advise, therefore, that prior to setting up meetings, Departmental employees should determine whom the state, local or tribal officials will represent in attending the meeting.

(iv) "... such meetings are solely for the purposes of exchanging views, information, or advice relating to the management or implementation of Federal programs established pursuant to public law that explicitly or inherently share intergovernmental responsibilities or administration." (Section 204(b)(2)).

This broad provision addresses the substance of meetings exempted from FACA. The OMB guidelines and instructions state repeatedly that the scope of meetings covered "should be construed broadly to include any meetings called for any purpose relating to intergovernmental responsibilities or administration." Therefore, we believe that most meetings held between Departmental employees

and state, local or tribal officials will be exempt from FACA where the purpose of the meetings is to discuss matters pertaining to Federal programs in areas where coordination with state, local or tribal governments is necessary or desirable. Such meetings include, but need not be limited to, seeking consensus or advice, or to exchanging views or information. They may be used to facilitate any interaction relating to intergovernmental responsibilities or administration.

B. Meetings with Individuals.

FACA itself and GSA guidelines make clear that one or more Federal officials may meet with an individual, for the purpose of exchanging information or obtaining advice or recommendations from that individual without implicating FACA. This applies regardless of whether the individual or the Federal official initiates the meeting, and there is no limit to the number of meetings that can take place.

Carrying this one step further, the guidelines recognize that Federal officials may initiate a meeting with more than one individual where the purpose of the meeting is to obtain advice and recommendations from each individual and not to achieve a consensus. Because the focus of FACA is whether there is a "group" giving advice, when an agency meets with a number of individuals it should emphasize that the agency is seeking only the attendees'

individual views, and the attendees should be discouraged from attempting to reach a consensus, or otherwise making recommendations as a group. For example, if the attendees were asked to determine what advice they could agree on and/or disagree on, that process could make the deliberations subject to FACA. Further, if the agency calls the meeting and the group insists on providing consensus advice, the agency's acceptance and consideration of the consensus advice also would likely implicate FACA. See Alabama-Tombigbee Rivers Coalition v. Department of the Interior, 26 F.3d 1103 (11th Cir. 1994).

In view of the foregoing, a bureau may hold a series of public focus groups, forums, or "roundtable" discussions to listen to individual views. These sessions should be structured in such a way as to obtain a wide variety of viewpoints instead of consensus among groups. In such cases, group deliberations should be discouraged or minimized; the absence of consensus alone may not be enough to avoid the requirements of FACA if the group acts and deliberates as a group.

C. Meetings with Ad Hoc Groups.

GSA guidelines also recognize that if an ad hoc group (such as a group of citizens concerned about a Departmental program) initiates a meeting with Federal officials to present its views on a subject

(presumably including the giving of advice), that meeting would not be subject to FACA. 41 C.F.R § 101-6.1004(j). This section contains a proviso, suggesting that FACA would apply if the agency "uses the group recurrently as a preferred source of advice or recommendations." In light of Public Citizen, discussed above in section III(B) and in the following section, the word "uses," as with the word "utilized," is interpreted to mean "in the same manner" as the Government would use a committee of its own establishment. Accordingly, Departmental offices should be aware of the extent to which their relationship with the newly formed group may be deemed to be an "establishment" of that group, thereby making FACA applicable. Factors that may suggest that a group has been established include: if the group becomes the bureau's preferred source of public input; if the group establishes working committees with a bureau to carry on assignments between regularly scheduled meetings; or if the agenda becomes a joint effort by the bureau and the group to address continuing problems. Further, even where a meeting is requested by an outside group, if the bureau funds the meeting or controls the agenda of the meeting, we believe the applicability of FACA would become more likely because the group would now begin to look like it is being organized or controlled by the Federal Government.

D. Meetings with Preexisting Groups.

The Supreme Court has recognized, in the context of the Department of Justice receiving advice from an American Bar Association (ABA) committee on the qualifications of potential judicial nominees, that meetings between Federal officials and preexisting groups may not be subject to FACA. Public Citizen v. United States Department of Justice, 491 U.S. 440 (1989). There, the Court found that the ABA committee was not covered by FACA because it was not "utilized" as Congress contemplated in the law. The Court found that the term was included in the law to make it clear that the law covered not only advisory committees established by an agency, but also committees closely tied to the Federal government and subject to "strict management by agency officials." 491 U.S. at 461; Food Chemical News v. Young, 900 F.2d 328, 332-33 (D.C. Cir. 1990). Therefore, under Public Citizen we believe that there are good arguments to support the proposition that meetings with preexisting groups that were not formed by and are not controlled by the Department (such as through funding, setting meeting agendas, or appointing members) are not subject to FACA.[7/] The bureaus have wide latitude to meet and work with such groups as long as there is no appearance of close ties or "strict management by agency officials." Public Citizen, 491 U.S. at 461; see Center for Auto Safety v. Federal Highway Administration, No. 89-1045 (D.D.C, Oct.

[7/] Where a group has continuing functions unrelated to providing advice to the agency, there is additional evidence of lack of Federal control.

12, 1990) (RCL). In Center for Auto Safety, the American Association of State Highway and Transportation Officials (AASHTO), a preexisting incorporated association of state government transportation agencies, created a task force to make revisions to AASHTO publications that previously had been adopted by the Federal government as highway design standards. Federal Highway Administration (FHWA) employees participated in drafting the revisions. The court found, relying on Public Citizen, that AASHTO was not subject to FACA, but agreed with the plaintiff that FHWA participation on the task force raises "the specter of secret advice channels to the agency and of agency capture by an outside consultant". However, the court found no evidence that FHWA received advice from AASHTO and that AASHTO's process for development of its policy is for its own benefit, and is not for the purpose of channeling advice to FHWA.[8/]

[8/] Plaintiffs in Center for Auto Safety argued that the facts of the case were distinguishable from those in Public Citizen. In Public Citizen, Department of Justice employees played no active role in the ABA meetings, whereas in Center for Auto Safety, Department of Transportation employees participated actively in the deliberations of the preexisting group. While this distinction may have been what caused the court to be concerned about the "specter of secret advice," the Supreme Court seems not to have made any such distinction in its analysis. Therefore, Center for Auto Safety may well be overly conservative in its view of the law. Nevertheless, because a court could conclude that regular use of a preexisting group for the non-public receipt of advice rises to the level of "close ties" to an agency, we advise that a determination be made to use a pre-existing group as a regular source of advice only after consultation with the Solicitor's Office.

E. Public Meetings.

Where Federal officials hold public or town meetings that are open to all, such meetings generally do not implicate FACA. The meetings should be widely advertised and should provide an opportunity for the public to submit written and verbal comments. Federal employees should not conduct or use public meetings to develop consensus advice from groups. A discussion led by a facilitator may produce a perception that a consensus is sought from those in attendance. Thus, if a bureau uses a facilitator at a public meeting, it should be careful to avoid encouraging broad conclusions or recommendations. It also should be remembered that where an agency has established or utilized a group in a way that renders the group and its meetings subject to FACA, but the agency has not complied with FACA's procedural requirements, merely opening the meetings of the group to the public will not prevent a violation of FACA.

F. Permit and Contract Administration.

Meetings with permittees and contractors concerning routine matters directly related to the particular permit or contract are normally not a problem under FACA. See Food Chemical News v. Young, 900 F.2d 328, 331 (D.C. Cir. 1990) (FACA does not apply to "'persons or organizations which have contractual relationships with Federal agencies;'" quoting H.R. Conf. Rep. No. 1403, 92d Cong., 2d Sess.

2, reprinted in 1972 U.S. Code Cong. & Admin. News 3508, 3509). FACA considerations could arise, however, if a meeting of a group of permittees or contractors is used for broader input on general matters of policy or management that may affect the permit and/or contract relationship, and if individuals other than permittees and contractors participate. Of course, a meeting with one permittee or contractor would not present a FACA problem even if the scope of the meeting goes beyond the contract/permit at issue.

G. Scientific Peer Review.

Peer review by individuals is not subject to FACA, but peer review by a group is subject to FACA. In 1994, the Court of Appeals for the 11th Circuit upheld a district court's injunction barring the Department from using a peer review report issued jointly by a group of non-Federal scientists initially brought together for their individual views. Alabama-Tombigbee Rivers Coalition v. Department of the Interior, 26 F.3d 1103 (11th Cir. 1994). Caution must therefore be exercised when soliciting peer scientific review from non-Federal scientists. It may be necessary to call a meeting of those who would serve as individual peer reviewers, such as when voluminous records must be reviewed and exist only in a single location. In such cases, bureaus should limit group discussions to factual information, avoid group discussions of substantive issues and ensure that only individual written reviews are obtained.

H. Departmental Employees Representing the Agency on Outside, Non-Federal Committees.

These are normally not subject to FACA. If, however, the committee is being used to solicit or develop recommendations to take back to the bureau, a court may find the activities subject to FACA. See the discussion, however, under section IV(D), above.

I. Liaison Activities.

FACA is not implicated solely by reason of a Federal employee serving as a liaison to an outside group, or allowing an outside group to designate a liaison to a bureau. If the role of liaison actually includes the utilization of a group to obtain advice or recommendations, FACA may apply. See the related discussions under sections IV(C),(D), above.

J. Operational Activities.

Where meetings with non-Federal entities are for operational, rather than advisory, purposes, FACA does not apply. The recent language contained in Section 204(b) of Public Law 104-4, discussed above, greatly relieves the burdens of compliance with FACA for most meetings with state, local and tribal government officials. Prior to enactment of Public Law 104-4, the clearest example of operational relationships exempt from FACA were statutory "primacy"

relationships with states, wherein states are authorized to enforce Federal laws, such as the relationship between OSMRE and certain states under the Surface Mining Control and Reclamation Act (SMCRA). See Natural Resources Defense Council v. U. S. Environmental Protection Agency, 806 F. Supp. 275 (D.D.C. 1992).[9/] Now, where state, local or tribal governments are involved exclusively, the existence of statutory relationships such as primacy is no longer a determinative factor in applying FACA.

Where the meetings in question do not involve exclusively Federal, state, local and tribal officials or employees, however, it may be necessary to determine the extent to which the meeting is operational rather than advisory, and therefore outside the scope of FACA. As noted in the GSA guidelines, FACA does not apply to

---

[9/] In NRDC, the court held that EPA had not established an advisory committee by inviting nine governors to participate in a "Governors' Forum on Environmental Management" to address the ability of states to carry out delegated program activities under the Safe Drinking Water Act. EPA and states share responsibility for implementation of the Safe Drinking Water Act, but EPA may delegate primary enforcement authority (primacy) to states meeting certain program criteria. Even where primacy exists, EPA retains a role in implementation through monitoring state programs for compliance with federal standards, providing technical assistance and funding.

The court found that plain statutory language gave states a critical and independent role in implementation. The court also found that the Governors' Forum did not appear or operate like an advisory committee, inasmuch as the group was chaired by one of the governors, no Federal funds were used to support the group, meetings and agendas were not controlled by EPA, the membership was not fixed, and the group's future activities were not known. Based on these factors, the court found that the governors were acting "operationally as independent chief executives in partnership with the Federal agency," rather than as an advisory committee. NRDC v. EPA, 806 F. Supp. 275, 277 (D.D.C. 1992).

meetings between bureau officials and outside entities and individuals for the purpose of carrying out operational functions that are specifically provided for by law. While there is much latitude here, the legislative authority for the joint operational responsibilities should be clear and not simply inferred from a general statutory charge to cooperate or consult with the outside entities. For additional guidance, refer to discussions of ad hoc and preexisting groups, above, and partnership agreements, below. Ultimately, the facts surrounding each statutory relationship will determine whether related consultations are likely to be subject to FACA.

K. Partnership Consultations.

Partnerships are agreements between DOI or a bureau and groups or individuals executed for the purpose of obtaining the non-Federal partner's support for DOI or bureau initiatives or programs. Partners generally are, or come from, groups that will be affected by the direction taken by policies or program management. Often the groups lack identities that are clearly distinguishable from the Federal agency mission.[10/] Many partnership agreements historically have included opportunities for the cooperating partner to provide their input to decisionmakers in the form of advice and recommendations reflecting their particular interests.

[10/] See the "established or utilized" discussion in section III(A), above.

Consultations such as these may be subject to FACA. The determination whether FACA applies will depend, in large part, on the identity and nature of the group (see Section IV(C) above) and the extent to which the consultations are advisory in nature. Partnerships that do not include opportunities for general consultation, but rather involve only the provision of support such as funds, labor, materials, or promotion for a particular project or program, more closely resemble operational activities, discussed above. Because a partnership can imply a consultative relationship, bureaus should be careful to avoid allowing partnership agreements with groups lacking clearly separate identities to be used recurrently as preferred sources of advice and recommendations.

L. Alternatives for Environmental Analyses Developed by Interested Citizens and Groups.

Some interdisciplinary teams working in the NEPA process have invited outside individuals or groups to develop and submit alternatives, such as in "scoping" and similar processes. FACA may be applicable if the outside submitters attend meetings and the activity becomes a consensus-building exercise whereby non-Federal participants join a bureau in developing alternatives for the bureau's consideration. However, the mere acceptance by a Federal team of solicited alternatives does not implicate FACA. Thus, individual written submissions of alternatives developed by non-

Federal persons generally can be solicited, outside of FACA, along with other information solicited as part of a scoping process. Scoping notices to the public may include the solicitation of alternatives from commenters. As in many environmental decisionmaking processes in which non-Federal participants play a role, restricting attendance at scoping and other meetings related to the development of environmental analyses is likely to generate public suspicion that FACA is being violated. Therefore, careful consideration should be given to opening these meetings to the public.

M. Contractor Activities.

The question whether a contractor can use a group to conduct the contractor's work has been addressed by the District of Columbia Circuit. Food Chemical News v. Young, 900 F.2d 328 (D.C. Cir. 1990). The answer depends on the circumstances surrounding the formation of the group and the agency's use of the advice the group provides. If the group is first formed by an agency, and then a contractor is retained to conduct the work of the group and channel the group's advice back to the agency, or if the agency suggests to the contractor that the group be formed and the contractor does so and channels the group's advice back to the agency, the group's deliberations likely are subject to FACA. On the other hand, if the contractor is retained first, and the contractor decides to assemble the group for its own benefit, this would not implicate

FACA. It is important that the idea for the group originate with the contractor and not the agency. The difference is that the agency establishes the group in the first instance, but the contractor establishes the group in the second.

For further information consult such standard references as: the Act itself; the section 204(b) of the Unfunded Mandates Reform Act of 1995, Public Law 104-4; OMB's recent guidelines and instructions regarding section 204(b) of Public Law 104-4; the Departmental Manual (308 D.M.); GSA Guidelines at 41 C.F.R. 101-6.1001 - 101-6.1035 (1990); and GSA's March 21, 1994 Memorandum on the application of the FACA to Intergovernmental Contacts.

Appendix 1

General Principles

Outside FACA	Potential FACA Problems
I. Statutory Exemptions	
Meetings where the group is comprised of full-time federal officers or employees. FACA, Sec. 3(2)(c)(iii).	
Any local civic group whose primary function is that of rendering a public service with respect to a federal program. FACA, Sec. 4(c).	
Any State or local committee, council, board, commission, or similar group established to advise or make recommendations to State or local officials or agencies. FACA, Sec. 4(c).	
Meetings held exclusively between Federal officials and elected officers of State, local and tribal governments (or their designated employees with authority to act on their behalf), to exchange views, information or advice relating to the management or implementation of Federal programs established pursuant to public law that share inter-governmental responsibilities. Public Law 104-4, Sec. 204(b).	Meetings held with additional individuals other than those specified in Public Law 104-4, or where non-Federal officials lack sufficient designated authority to act on behalf of elected officers.

Appendix 2

What Is Required for an Advisory Committee Covered by FACA?

A. What does FACA require to establish an advisory committee?

Before establishing an advisory committee, the President or Federal government must, in accordance with FACA and the GSA guidelines:

1. determine the advisory committee to be in the public interest;
2. determine that the functions of the committee could not be performed by an existing committee or by one or more Federal agencies;
3. ensure that the committee will be:
   (a) fairly balanced in terms of the points of view represented, and
   (b) fairly balanced in terms of the functions to be performed;
4. ensure the advisory committee will not be inappropriately influenced by any special interest;
5. provide adequate staff and resources; and
6. publish notice in the Federal Register.

B. What does FACA require to charter an advisory committee?

Before an advisory committee can begin meeting, its charter must be published, reviewed and approved. The charter sets out information about the committee, including:

1. the committee's objectives and scope of activity;
2. the agency or official to whom the committee reports;
3. a description of the duties, and if the duties are not solely advisory, a specification of the authority for such functions;
4. an estimated annual operating cost;
5. estimated number of meetings; and
6. estimated termination date of the advisory committee.

C. What does FACA require for the operation an Advisory Committee?

To ensure public access to the work of the advisory committee, FACA requires that:

1. except for fairly limited circumstances, all meetings of the full committee must be open to the public;
2. a notice of meetings is published in the Federal Register at least 15 days before the meeting;
3. interested individuals who are not members are allowed to submit statements to the committee and, if the agency's guidelines permit, speak at the meeting;

Outside FACA	Potential FACA Problems
II. Not A Group	
a. Meetings with a single individual.	
b. Meetings with more than one individual where advice of individual attendees is sought.	Meetings with more than one individual (group) where the individuals provide consensus advice or otherwise act as a group.
c. Public meetings, roundtable discussions, and the like to solicit individual views.	Public meetings, roundtable discussions or the like where meetings are used to develop consensus or group advice.
III. Not "Established" or "Utilized"	
a. Meetings initiated by a group to provide the group's view (including advice).	Group-initiated meetings where the group is used recurrently as a preferred source of advice.
b. Meetings with pre-existing" groups not closely tied to Federal Government.	Meetings with "preexisting groups" where factors suggest close ties or management by Federal Government.
c. Where a contractor, on its own initiative, decides to create an advisory group to provide it assistance in preparing, for example, a report for an agency.	Where the agency directed or suggested that the contractor establish an advisory group.

Outside FACA	Potential FACA Problems
IV. Not Advice or Recommendations	
a. Meetings with groups for the purpose of exchanging facts or information.	
b. Meetings with groups that perform primarily operational functions specifically provided by law, as opposed to advisory functions.	Operational groups that become primarily advisory in nature.
c. Meetings with permittees or contractors to discuss routine matters directly related to the particular permit or contract.	Meetings with permittees or contractors which are used to obtain broader input on general policy matters.
d. Meetings of subgroups of chartered FACA committees where purpose of the meeting is to do research for, or prepare proposed position papers for the committee.	The subgroup may not make any recommendations directly to the agency; it must operate through the chartered advisory committee, which must consider and deliberate the subgroup's product in the course of a public meeting of the advisory committee.

I. Convening an ADR Event

J. Consensus

K. Ground Rules

L. How ADR Proceeds

M. Sources of Practitioners

Section I. Convening an ADR Event

Guidelines for Convening an ADR Event
by John R. Schumaker, Ph.D.

This guideline is designed to provide guidance for agency-initiated ADR events, particularly those requiring voluntary participation. The concepts discussed in this article are applicable for any unit of government, any organization or any individual who proposes to convene an ADR event.

Many ADR events require voluntary participation, and it is incumbent upon agency personnel to have the skills to effectively convene an ADR process. Whether the ADR event is voluntary or not many of the same skills are equally valuable when an ADR event is dictated by law, court order, policy, or regulation.

Other ADR processes are mandated by court rule, business agreements, or contracts; and these processes are convened in accordance with applicable court rules, contracts, or regulations. The conveners for these processes generally work with only one ADR process and have relatively clear procedures for convening the process.

Once the appropriate agency manager has decided to consider using of an ADR process, much work will be required to carry out the intent of the manager (see the assessment paragraph below). Convening activities are described by Susskind and Cruikshank (1987) as the prenegotiation phase of the consensus-building process. The objective of the prenegotiation phase is to set the stage effectively to convene a particular ADR event. Prenegotiation includes many preliminary activities such as ADR process selection, participant (stakeholder) identification, stakeholder education, meeting arrangements, and ADR practitioner selection. This preliminary work in the prenegotiation phase can be referred to as the convening function, and I refer to the agent responsible for carrying out the function as the convener.

Some ADR processes or programs clearly describe the convener function and provide instructions on how this function is accomplished. The Negotiated Rulemaking Act (Reg-Neg) and supporting literature from the Administrative Conference of the United States describe the role of the convener in the Reg-Neg process (Pritzer 1990). This source also provides guidance on how to select a convener.

Natural-resource and public-land management presents an opportunity to use a wide variety of ADR processes, hence agency conveners need to be familiar with a wide range of ADR processes. A well-trained convener is especially important where the appropriate ADR process is voluntary and where the parties to an issue or dispute are not familiar with ADR processes and procedures. It is not enough to decide to use an

ADR process such as a facilitated collaborative decisionmaking public meetings or mediation, and assume all stakeholders will know what this means or that all parties will agree to participate in the proposed process, if their voluntary agreement is required. The convener, with his or her special knowledge and skill, is responsible for ensuring that the ADR event is convened properly.

A convener can be the agency manager, any person designated by the manager for a specific situation, or anyone mandated by policy or regulation for a particular program area such as land-use planning or person(s) from academia or the private sector. The neutrality of the convener and the perception of neutrality of the convener by all the stakeholders must be evaluated carefully. In some cases, an agency employee close to the issue and manager can serve effectively as the convener. In other cases, the convener should be an agency employee organizationally distant from the issue and manager, an employee of another agency, or a private neutral. One role of the convener is to get the ADR process accepted and begin the process of building trust with the stakeholders; hence managers need to weigh carefully the neutrality issue when designating a convener.

The duties and responsibilities of the convener include, but may not be limited to, the following functions. Effective accomplishment of the functions of the converner require a series of judgment calls by both the manager and the convener. Each factor or function is discussed in detail. See Appendix A for a checklist for converners.:

Situation Assessment:

The first essential step is to conduct an assessment of the situation to determine what type of dispute or potential dispute exists, who is likely to be involved, if the dispute or potential dispute is ripe for resolution, and what is the likelihood that an ADR process is the appropriate means of dealing with the situation. Agency managers may use their own resources or enlist the assistance of personnel in other agencies, academia, or the private sector to conduct the assessment. In complex, public-land management situations, managers should consider use private sector neutrals to assist them and their staff in the situation assessment, and subsequently to use private sector neutrals to conduct the selected ADR process.

The authority of agency managers to select or influence the selection of an ADR process decreases as authority over a dispute rises in the hierarchy of adjudication systems. At the beginning of the dispute-development scale, also referred to as the struggle spectrum, which is described by Keltner (1987), agency managers have significant control over if, when, and what type of ADR they may propose to use to prevent and resolve disputes. At the upper end of the dispute-development scale or struggle spectrum, agency cases in the Federal

courts are managed by the Department of Justice and U.S. attorneys, along with the presiding judge and attorneys for the opposing party, make decisions regarding the use of ADR processes. Guidance from the Attorney General states that U.S. attorneys may, but are not required to, seek the consent of agency managers to use an ADR process (Department of Justice, 1992).

Recommend using the ADR process that is most applicable to the situation (preventive collaborative decisionmaking, or a dispute resolution process):

Identifying the issues and stakeholders can be key factors in deciding which ADR process to use. When agency decisionmaking is in the formative stages, such as in the early stages of a resource management plan, a forest plan, or modifying plans, facilitated public meetings may be the ADR process of choice. This is typically referred to as collaborative decisionmaking or consensus building. If an issue involves an administrative or court challenge to a decision that has been announced by the agency, other processes such as mediation may be more appropriate. A wide range of ADR processes and variations of these processes are available for consideration (Schumaker, 1995).

If the substance of a dispute is relatively clear, the manager may want to elect to move directly to a process such as negotiation or mediation. If the issue is unclear, the manager may want to use a factfinder or other investigative approach to get a clearer view of the issues being disputed and the stakeholders who may be involved. Conveners need to understand the concepts and objectives of each ADR process so they can make effective recommendations about selecting an ADR process. The scope of a dispute and the number of stakeholders involved are also factors in determining the type of ADR process to use.

- Identify all stakeholders:

Increasing demands for the allocation of natural resources increase the number and variety of individuals and groups (the stakeholders) that are affected by and interested in influencing natural-resource and public-land management decisions. An effective way to preclude negative responses and gain positive support for management objectives, including determining management objectives, is to include all stakeholders in the decisionmaking processes at the earliest point possible. Failure to include a legitimate stakeholder could provide an individual or group with a valid basis for challenging decisions with administrative appeals and court actions. Careful analysis of potential issues and interests is necessary to ensure all stakeholders are identified.

Stakeholder identification is not always a routine, simple process. Stakeholders may range from a variety of local and regional groups or individuals to national

and international interests. Careful analysis of groups that have national, regional, and local organizations is essential because these multilevel groups, while seeming the same, may be fractured and have different goals based on their level in the organization. Fortunately, most agencies already have extensive, generally well-mainatained lists of stakeholders kept by the public affairs staffs and program managers. While these lists are very valuable and should be reviewed early in the stakeholder identification process, lists should not be accepted as gospel. Each dispute is unique and stakeholders may differ.

Stakeholder identification can be a critical step in resolving what seems to be a two-party dispute such as the implementation of a project approved in a land-use plan. As many resource managers have probably discovered, resolution between the agency and one group may have adverse effects on other stakeholders, so a settlement between the agency and the group can easily lead to disputes with other interests. Successful managers learn when to limit negotiations and when to widen the circle of involvement.

- Determine whether the ADR process is voluntary:

As stated in the introduction, the use of ADR processes (generally those used to resolve specific disputes,) requires agreement of the parties involved in the dispute. Other processes, such as facilitated collaborative decisionmaking during the development of a resource management plan or an environmental impact statement, can be used by the agency without the consent of the parties. If a significant stakeholder or group of stakeholders decline to participate, it suggests the assessment process missed some very important information and the process should be reviewed.

- Coordinate the selection of a third-party neutral (if needed):

Selecting faciliators, mediators, factfinders, and other neutral parties can be a critical step early in conducting an agency-initiated ADR event. In some cases, it is appropriate for the agency to preselect the neutral, while in other cases the stakeholders need to participate in selecting the neutral. Often, it will be appropriate for the agency to select the neutral(s) to facilitate a large multiparty event such as the development of a resource management or forest plan, while it may be essential to share with the stakeholders in selecting a mediator for a small-party dispute. Agency employees, even those who are trained and skilled in ADR processes, generally should not be selected to serve as a neutral in these situations.

- Contact all stakeholders, explain the agency's desire to use an ADR process, and educate parties about the ADR process:

Mere identification of the stakeholders is not sufficient. Many stakeholders will not be knowledgeable of ADR processes and may be wary of agency proposals to use an ADR process. A key responsibility of the convener is to contact all stakeholders to educate them about the ADR process the agency proposes to use. The timing of this contact is a judgment call and correct timing could be a key factor in the success of the ADR event. The number of stakeholders, public knowledge of the issues or dispute, prior experience with dispute resolution processes, the level of public trust in agency management, and consent requirements are but a few of the factors that will determine when and how much stakeholder education is needed.

- Obtain agreement to use an ADR process:

Since many ADR processes require agreement by all parties, agency managers may be required to obtain the consent of every stakeholder before an ADR process can be initiated. Agreements to participate in an ADR process may involve a simple oral agreement to meet to negotiate an issue. On the other hand, voluntary participation may be dependent on a complex, detailed set of predetermined ground rules and issue identifications that require the signature of many individuals and group representatives.

- Explain the confidentiality provisions related to the chosen process:

Some ADR processes, generally small-party cases, operate under strict confidentiality rules. In other cases, the premise of confidentiality is unworkable, particularly when the provisions of the Federal Advisory Committee Act must be followed. Media coverage and press releases are issues that often need to be addressed before an ADR event begins. The media issue also can be addressed as part of the ground rules developed and agreed upon by the participants after the ADR eveny has begun..

- Obtain agreement on how the cost of an ADR event will be paid:

In the ideal world, costs of the services of neutrals for an ADR event and other costs such as facilities would be shared equally by all parties. However, costs for dispute prevention events such as collaborative decisionmaking for land-use planning or an EIS are typically borne by the Federal agency or company responsible for the project. Other public-land management disputes may involve parties with ample resources and parties who cannot afford to share the cost of convening an ADR event. The convener or the facilitator/mediator needs to assess the capability of each stakeholder to share in the expense. Adjustments in sharing payment for neutrals and other expenses can be negotiated for those who cannot afford to pay their full share or who are opposed to doing so for other

reasons. This negotiation can occur before the event begins or during the process of developing ground rules The convener also needs to be aware of Federal procurement regulations to ensure these rules are followed. The Administrative Dispute Resolution Act, PL 104-320, provides guidance on the expedited hiring of ADR neutrals. See Section G. Procuring of Neutrals for guidance.

- Handle meeting arrangements:

The convener or the neutral, if one has been selected, generally is responsible for selecting meeting sites and times and coordinating all other activities essential to conducting a successful ADR event. Stakeholder schedules and locations need to be considered. A variety of meeting arrangements can be used, including electronic means. The joint Bureau of Land Management and U.S. Forest Service Upper Columbia Ecosystem Management Team conducted a real-time facilitated public scoping meeting in 1995 using interactive satellite conferencing techniques at nine locations in the Upper Columbia Basin in order to involve all stakeholders in the scoping process. Private-sector facilitators were used to facilitate the meeting at each remote site. The Nuclear Regulatory Commission has developed an electronic meeting process on the Internet called Rulenet that can be used to agument face to face meetings. A detailed explanation of Rulenet can be found by typing "rulenet" in the serch bar of most Internet search engines.

- Monitor the progress of the ADR process. Be prepared to recommend changes in the ADR process if needed. Ensure guidelines or laws such as the Federal Advisory Committee Act are followed.

Just because an ADR event is off and running does not mean the process will stay on track or accomplish its objectives. The agency may want to establish time limits for the ADR event. The convener and management officials need to review progress of the ADR event continually and be prepared to make procedural and process adjustments as needed. This can be a very sensitive issue. Actions that might appear to suggest manipulation by agency management need to be carefully evaluated. The convener may also act as an advisor to the neutral and the stakeholders to ensure applicable Federal law is followed. Another role of the convener may be to set up subsequent meetings or obtain needed information for the stakeholders. The convener may serve as the recorder and reporter for the ADR event, although this function can also be accomplished by the neutral who manages the event. Finally, the convener might be responsible for obtaining necessary signatures and overseeing final publication of agreements and other documents (McCreay 1989).

Summary

The process of resolving large- and small-party natural resource disputes can be as tricky as negotiating minefields in Bosnia. However, skill and hard work by knowledgeable agency managers and their staffs can go a long way in ensuring that ADR processes used to prevent or resolve disputes work effectively. A good foundation for using an ADR process can be laid by a skilled convener. Success often leads to other successes, so as agency managers adopt or expand their use of ADR processes, it is important that their initial efforts be successful. This can be accomplished by following the concepts outlined in this paper.

Appendix A: Check list for Conveners

Convening an ADR Event

Checklist for Managers and ADR Consultants:

Have you conducted an assessment to determine if an ADR process is appropriate?

Will you or someone else do the work necessary to convene the ADR process?: your staff_____,staff from another agency _____, private neutral_____, university staff_____, other_____.

Have you clearly identified the issue or dispute and the stage of the issue or dispute?

Which ADR process will be used (preventive collaborative decisionmaking or a dispute resolution process): Negotiation___, facilitation___, mediation___, arbitration___, factfinding___, early neutral evaluation___, summary jury trial___, mini-trial___, other___?

Have you identified all who are involved in the dispute: the stakeholders, the blockers, the supporters?

Does the process require voluntary participation?

If applicable, have you determined how you will comply with the Federal Advisory Committee Act?

Will you use a third-party neutral, and is it necessary to coordinate the selection with the other stakeholders?

Have you contacted all stakeholders to explain the agency's desire to use an ADR process, and have you educated parties about ADR processes?

If needed, have you obtained agreement(s) to use the ADR process?

Have you determined if confidentiality is important to the process and how to achieve it, if needed?

Will other stakeholders share in the expense of the ADR process; and, if so, have you reached an agreement on cost?

Who will make meeting arrangements? Have you considered the needs of all stakeholders in setting the time, place, frequency, and duration of the proposed

meetings?

Have you determined how you will monitor the progress of the ADR process, and are you prepared to recommend changes in the ADR process if needed?

References

Administrative Dispute Resolution Act. 1996. Public Law 104-320

Dagget, Dan. "Team from the Devil's Kitchen." Range. 3.4 (Fall 1995) 6-10.

Department of Justice, Civil Division. "Guidance on the Use of Alternative Dispute Resolution for Litigation in the Federal Courts." Washington, D.C., August 1992.

Keltner, John W. (Sam). Mediation, Toward A Civilized System of Dispute Resolution. Annadale, VA: ERIC Clearinghouse, 1987.

McCreary, Scott T. Resolving Science-Intensive Public Policy Disputes. Diss. Massachusetts Institute of Technology, 1989.

Pritzer, David M., and Deborah S. Dalton. Negotiated Rulemaking Sourcebook. Office of the Chairman, Administrative Conference of the United States, Washington, D.C., 1990.

Schumaker, John R. Alternative Dispute Resolution, Employee Knowledge and Attitudes in Six Federal Natural Resource Management Agencies. Diss. University of Idaho, 1995.

Susskind, Lawrence, and Jeffrey Cruikshank. Breaking the Impasse: Consensual Approaches to Resolving Public Disputes. New York: Basic Books, 1987.

Best Practices for Government Agencies

Guidelines for Using Collaborative Agreement-Seeking Processes

Report and Recommendations of the
SPIDR Environment/Public Disputes Sector Critical Issues Committee
Adopted by the SPIDR Board January 1997

These recommendations have been prepared by a committee supported by a grant from the William and Flora Hewlett Foundation, and jointly sponsored by the Hewlett Conflict Resolution Theory Center at Georgia Tech and the SPIDR Environment/Public Disputes Sector. The Committee included practitioners from within and outside government, government program managers, and university researchers.

This report focuses on best practices for users in the United States. While it may be applicable in other countries, it may need to be tailored to the political frameworks and particular institutions in those contexts.

This is intended as the first in a series of cooperative efforts between theoreticians and practitioners to serve the needs of the emerging practice of conflict resolution in the public policy arena. This report has been reviewed and improved immeasurably by practitioners and government agency dispute resolution managers.

Critical Issues Committee

Gregory Bourne, Co-Chair, Consortium on Negotiation and Conflict Resolution, Georgia Tech
Christine Carlson, Co-Chair, Ohio Commission on Dispute Resolution and Conflict Management
James Arthur, Coordinator, Washington State Dispute Resolution Project
Howard Bellman, Mediator, Madison, Wisconsin
Deborah Dalton, Consensus and Dispute Resolution Program, U.S.EPA
Michael Elliott, Consortium on Negotiation and Conflict Resolution, Georgia Tech
James Kunde, Coalition to Improve Management in State and Local Government, Arlington, Texas
Michael Lewis, Mediator, Washington, D.C.
Craig McEwen, Professor, Bowdoin College, Brunswick, Maine
Suzanne Goulet Orenstein, Vice President, RESOLVE, Washington, D.C.
Charles Pou, Practitioner, Washington, D.C.
Wallace Warfield, Professor, George Mason University, Fairfax, Virginia

Copyright © 1997 by SPIDR. Photocopying portions of this report and its appendices is encouraged for the purpose of informing users about relevant best practices. Photocopying portions of this report for any fee-for-service activities requires written permission from SPIDR.

To receive written permission or order additional copies of this report, please contact the Society of Professionals in Dispute Resolution (SPIDR) at 815 15th Street, NW, Suite 530, Washington, DC 20005 Phone 202-783-7277 Fax 202-783-7281

INTRODUCTION

These guidelines for best practice are proposed by the Society of Professionals in Dispute Resolution for federal and state government-sponsored collaborative approaches that seek agreement on issues of public policy. The processes these guidelines address have the following attributes:

- participants represent stakeholder groups or interests, and not simply themselves,
- all necessary interests are represented or at least supportive of the discussions,
- participants share responsibility for both process and outcome,
- an impartial facilitator, accountable to all participants, manages the process, and
- the intent is to make decisions through consensus rather than by voting.

Who Can Benefit from These Recommendations?

The recommendations in this report are directed primarily towards federal and state officials to help ensure successful use of collaborative processes for decision-making. They may also be useful to local government, although consideration must be given to how stakeholder-based processes may effect more inclusive citizen participation strategies.

Background

Negotiation and consensus building have long been used to resolve policy conflicts. Governments, businesses, interest groups and individuals negotiate and use cooperative approaches to decision making every day, whether formal or informal, by choice or out of necessity. These activities are not new.

What is relatively new is the intentional application of these processes, assisted by an impartial facilitator, to a wide range of multi-party, multi-issue disputes and controversies. In the 1970s mediators began helping parties settle environmental disputes, usually over site-specific issues, but also over land use and the allocation of natural resources. The use of collaborative efforts has evolved to developing policies and regulations for a broad array of issues. From about 40 cases in the 1970s, the number grew to over 400 during the 1980s, and the trend is continuing. An approach that began as a foundation-funded experiment has increasingly become a component of governmental decision making.

Reasons for this growth vary, but these factors stand out. First, consensus-based agreement seeking processes have proven successful in a wide array of applications, particularly where several agencies or levels of government have jurisdiction, power is fragmented, and there are a variety of stakeholders with conflicting views, (e.g., resolving complex multi-party issues, developing regulations, policy making, strategic planning.)

Second, the American public has lost confidence in the ability of government to solve problems and has demanded more say in policy making which has accelerated the use of consultation and consensus-building as ways of working out decisions that can be implemented. Consensus-based approaches have the advantage of building agreements that last. The focus on collaboration and seeking mutually acceptable outcomes contributes to improved understandings among participants, which in turn enables them to work out differences and arrive at better solutions. These consensus-based approaches are increasingly being viewed as a cornerstone in reinvention efforts that call upon governments to become more efficient and effective.

Current Uses of Collaborative Processes: Concerns and Questions

Along with the growth in use of these processes, a number of concerns and questions have emerged regarding the appropriate use of these processes. These include:

Concerns about how collaborative processes are used by agencies who are the authorized decision maker(s):

- How can regulatory agencies share control over processes and products while retaining their mandates?
- How do the cultures of bureaucratic agencies adjust to decision making by consensus?
- By seeking consensus among stakeholders, might public officials in some cases essentially be avoiding the tough decisions they have been mandated to make?
- If public officials purport to be seeking agreement with stakeholders, but actually only seek advice or input, might they contribute to cynicism about government?

Concerns about participation:

- Who decides who can participate and how is it decided?
- How might increasing reliance on collaborative processes affect the ability of some groups to participate? Could they be spread too thin?
- How can agencies prevent participants from feeling co-opted or coerced?
- What if all interests cannot be identified? What if some interests cannot be represented? Does the collaborative process still go forward?
- If agreement is reached, will traditional opportunities for public comment be diminished?

Concerns about the proper use of mediators and facilitators:

- In the eyes of other participants, can an agency staff person serve as an impartial facilitator?
- When government agencies hire the mediator, how can selection and procurement be conducted to ensure the mediator's credibility with all parties?
- How can the mediator be accountable to all when under contract with an agency?

Concerns about maintaining the effectiveness of collaborative processes:

- How will governments' need for routine, consistency, and due process affect collaborative processes? Will governments prescribe, bureaucratize, and mandate an approach that has succeeded to date largely by being adaptive, flexible, and voluntary?
- Given the workloads and time pressures some government agencies are under, will more be expected from collaborative processes than they can deliver? Will there be enough time, money, and staff for such processes to succeed?
- How can consensus-based efforts produce effective, practical decisions that satisfy more than just the lowest common denominator?
- Will sufficient attention be given to strategies and resources needed to implement agreements reached?

Terminology of Collaborative Processes

As the use of collaborative approaches for resolving public issues has expanded, so has the terminology for naming and describing them. As a first step in sorting out the terminology, the Committee distinguished agreement-seeking processes from two other primary purposes for discussions between government agencies and the public—information

exchange and advice. Given these objectives, the following chart highlights the differences in outcomes that can be expected:

PURPOSE	OUTCOMES
1. Information exchange	Improved communication and understanding; lists of concerns and/or options; better definitions of problems or issues
2. Feedback/Consultation	Opinions or suggestions for action are obtained; plans or drafts are refined
3. Agreement-seeking or decision-making	Agreements on actions or policies are reached; consensus is developed

Only processes in the third category are the subject of this report, but even labels for them abound. Some derive from labor/management bargaining. Others combine words that describe some attribute of collaborative consensus-based public policy processes. The list below gives a sense of the hybrids that may be found.

cooperative decision making
collaborative agreement-seeking processes
collaborative consensus-based forums
consensus-based processes
shared decision-making
negotiated processes
mediated negotiation
mediated agreement-seeking processes
policy dialogue
facilitated consensus forum
collaborative agreement-seeking processes
negotiated rulemaking
collaborative decision making
environmental conflict resolution
consensus-building
joint decision-making
environmental mediation
multi-party negotiations
mediated approaches
public policy mediation
joint problem-solving
facilitated joint decision making
facilitated negotiations
regulatory negotiation

The imprecise nature of these terms underscores the need for participants in each case to define their process clearly. As for labeling a particular process, participants usually refer to it in concrete, case-specific terms, such as "resolving the Westside urban growth issue", "trying to establish a new state policy for nursing homes", "the airport noise negotiations", or "the harbor development roundtable." Regardless of the label, type of public issue being discussed, or venue within which it occurs, the essential activity is the same—people representing different interests trying to find a solution that works for all through negotiation, assisted by someone acting impartially who manages the process.

Central to this activity is a search for consensus, a concept that in itself can generate controversy, and that participants should also define for themselves. Commonly, the term is used in the practical sense of, "Do we have an agreement everyone can live with—and that is doable?" Politicians often recognize a similarly practical but lower threshold for consensus, as in, "Do we have enough agreement to keep us out of trouble and to allow us to move forward?" The important principle is that these processes do not operate by voting or majority rule. Either the parties reach agreement (according to their definition) or they do not. If they do not, they may decide to explain how they disagree, but a majority/minority report is not a desired product of a collaborative effort.

Finally, this report employs the term *facilitator* for someone who manages a negotiated process. While *facilitator* and *mediator* are sometimes used interchangeably, facilitator is a more general term than mediator. Facilitators manage meetings for purposes other than negotiating agreements. Facilitators may also need to be mediators for these processes.

RECOMMENDATIONS FOR BEST PRACTICE

The recommendations that follow are directed towards overcoming the concerns and problems that have been identified. They propose a set of best practices for use of collaborative decision-making processes.

Recommendation 1: An Agency Should First Consider Whether a Collaborative Agreement-Seeking Approach Is Appropriate

Before a government agency or official decides to sponsor an agreement seeking process, it should consider its objectives and the suitability of the issues and circumstances for negotiation. In particular, before the sponsoring agency convenes a collaborative process, it is essential for the agency to determine internally its willingness to share control over the process and the resolution of the issue.

The decision to try to resolve a public issue by bringing together representatives of affected interests entails several important preliminary steps. The first is for agency staff to consider whether the issues might be suitable for negotiation, and if so, whether negotiation might meet the agency's objectives and responsibilities.

There are many factors to be taken into account in making the determination: suitability of the issues, ripeness for decision, time available, political climate, and the nature of past and present controversies over the issues among the key interests. Appendix 1 provides a check list of factors to be considered as part of an initial screening.

If after an initial screening negotiation appears plausible, agency staff and management next should discuss whether they are willing to negotiate. An important consideration is the relationship of such a collaborative approach to the agency's statutory decision making responsibility:

- What would be the role of the agency in the talks? Would the negotiations occur primarily among stakeholders with agency staff in the role of technical advisor? Or should the agency participate as a negotiating entity? Collaborative processes have succeeded under both options, but the agency's role should be clear.

- What form might an agreement take to be consistent with the agency's responsibility as final decision maker? For example, in some collaborations, consensus is expressed as an agreement that the agency translates directly into regulation or other official action. In others, the product is a consensus recommendation which the agency then considers in making a decision.

Misunderstanding between the agency and stakeholders can occur if the agency calls a meeting for one purpose, but tries to achieve another. One example is convening a process for information sharing and then expecting agreements to emerge. Another is holding meetings under the guise of consensus building, when information gathering is the sole and intended purpose, or portraying a public relations (opinion changing) initiative as a

collaborative process. Misuse of collaborative processes diminishes the likelihood of their future use. The same cynicism that sometimes marks public reaction to government's efforts to solve problems can extend to improperly used collaborative processes.

If agency management supports the idea of negotiation, then the next step is to begin discussing the possibility of a collaborative approach with representatives of other stakeholders.

Recommendation 2: Stakeholders Should Be Supportive of the Process and Willing and Able to Participate

In order for an agreement-seeking process to be credible and legitimate, representatives of all necessary parties—those involved with or affected by the potential outcomes of the process—should agree to participate, or at least not object to the process going forward. If some interests are not sufficiently organized or lack resources and these problems cannot be overcome, the issue should not be addressed through collaborative decision-making.

When decisions are made in consensus-based forums, influence from non-agency parties increases. To preserve the legitimacy of the process, all interests must be adequately represented and have joint control over the shape of the process and its outcomes. Because collaborative decision-making processes have such potential power, they should be used only when people representing necessary interests can be sufficiently identified and are willing and have the resources to participate effectively. To proceed otherwise could undermine the effectiveness of collaborative processes.

Determinations about representation are easiest when stakeholders are obvious, and when they are prepared to participate effectively in the discussions. Reaching agreement may be difficult, but at least there is no question about the legitimacy of the process. When the issues at stake affect all of society, or at least a large segment of it, the identification and organization of stakeholders is much more difficult. If some interests are obvious but others are not so clear, or if interest groups are disorganized or lack sufficient power, time, or money to participate effectively, there are real dilemmas to be confronted about whether or not it is appropriate to convene a collaborative decision-making process.

The agency should specifically examine whether other agencies, levels of government, and elected officials have a stake in the issues and seek their support for the process. The involvement of other governmental entities is often critical to successfully resolving the issues and implementing the agreements.

The burden of assuring that participants have the ability to participate effectively falls most heavily on the sponsoring agency. Training or orientation in how the process works, and support systems—expertise, information resources, or financial support to enable participants to get to meetings or to communicate with their constituencies—can be provided if acceptable to all parties as part of the process.

Recommendation 3: Agency Leaders Should Support the Process and Ensure Sufficient Resources to Convene the Process

Agreement-seeking processes need endorsement and tangible support from

actual decision-makers in the sponsoring agency or agencies with jurisdiction and, in some cases, from the administration or the legislature. The support and often the involvement of leadership is necessary to assure other participants of the commitment of authorized decision makers who will be responsible for implementation. Their support helps sustain the process through difficult periods and enhances the probability of reaching agreements.

Sponsoring agencies also need to ensure that there are sufficient resources to support the process from its initiation through the development of an agreement. As part of the pre-negotiation assessment, sponsors need to determine how they will meet evolving resource needs and provide funds and staff to accomplish the goals of the negotiation.

In order to undertake an agreement-seeking process, agency leaders need to believe the issue is of high enough priority for them to lend their support and the resources needed to achieve a useful and implementable outcome. If leaders are aware of obstacles that could stand in the way of success, including political obstacles, they need to be willing to address those obstacles and help create the kinds of incentives that make it worthwhile for other stakeholders to participate.

When leaders show visible support, including consistent involvement in meetings and substantive discussions, other participants are reassured that their investment of time and resources is worthwhile. If agency leaders do not provide support, caution should be exercised in initiating collaborative agreement-seeking processes. Without this support, the likelihood of success is greatly diminished.

The sponsoring agency needs to ensure that it is appropriately represented at the table, and is prepared to support its representative. It is also important for the sponsoring agency to be consistent, and to the extent possible, to speak with one voice throughout the process (especially as the time for decision-making on key issues.) Agencies should develop internal support for initiating and participating effectively in agreement-seeking processes.

Multi-party negotiations can require considerable staff time and funds. Participants may need technical assistance beyond what the agency can provide. Negotiators collectively may want the advice of outside experts. If a key party lacks sufficient staff or other resources, it may be important to provide them with organizational or technical assistance within the process. If resources cannot be secured to assist key parties to participate, either as part of the process, or by agreement or with help from the other parties, then the agency should use means other than collaborative agreement-seeking to reach a decision.

Recommendation 4: An Assessment Should Precede a Collaborative Agreement-Seeking Process

Before a government agency or official initiates an agreement-seeking process, it should assess whether the necessary conditions are present for negotiations to take place. Presence of the factors in recommendations 1-3 are best ascertained as part of a deliberate assessment.

There are three phases to successful agreement-seeking process: Phase 1, the assessment and preparation, or pre-negotiation phase, involves determining whether the necessary factors to ensure legitimacy are present as well as planning and preparing for the process.

Phase 2 involves engaging in negotiations to try to reach agreement. Phase 3 involves implementing the agreement.

During the pre-negotiation phase, an assessment is conducted to help the agency and other participants determine whether or not to proceed. Potential participants need to agree to participate before an agency decides to pursue an agreement-seeking process. It is here at the beginning of the process when an experienced facilitator may be of greatest service. Unfortunately, agencies often call on the facilitator only after they have invited all the participants and scheduled the first meeting.

Primary factors contributing to the legitimacy of agreement-seeking processes include willingness by all key parties to participate, appropriate structure and management of the process, and existence of sufficient resources both to support the process and to develop an implementation plan. The assessment involves ascertaining whether these factors are present. A facilitator often plays an integral role at this stage, consulting with the agency to help clarify its objectives, and interviewing potential parties to ascertain their views. This phase provides an opportunity for the facilitator to develop agreements among all participants about the scope of the issues, objectives and design of the process, role of consensus as decision rule, and timelines. The assessment is thus essential for evaluating the factors in recommendations 1 through 3. While the assessment can take weeks, experience demonstrates that it is key to success and saves time overall. (See Appendix 2 for guidelines for conducting an assessment.)

Recommendation 5: Ground Rules Should Be Mutually Agreed Upon by All Participants, and Not Established Solely by the Sponsoring Agency

All participants should be involved in developing and agreeing to any protocols or ground rules for the process. Once ground rules have been mutually agreed upon, the facilitator should see that they are carried out, or point out when they are not being followed and seek to remedy the problems. Any modification to ground rules should be agreed upon by all participants.

Ground rules should clearly state the purpose and expectations for the process and the end product, how the process will be conducted and decisions made, the roles of the participants, including the sponsoring agency, the role of the facilitator, and other matters that are important to assure participants of the fairness of the process. Appendix 3 contains guidelines for formulating ground rules.

Jointly agreed upon ground rules or protocols establish joint ownership and control over the process. Without this sense of parity and investment amongst all participants, it will be more difficult to instill confidence in the legitimacy of either the process or the outcomes. Ground rules also guide and empower the facilitator. These procedural safeguards are a straightforward mechanism to help ensure that the process is, and is perceived, as credible.

Recommendation 6: The Sponsoring Agency Should Ensure the Facilitator's Neutrality and Accountability to all Participants

It is preferable for all parties to share in selection of the facilitator. When that is not possible, an agency has a responsibility to ensure that any

facilitator it proposes to the participants is impartial and acceptable to all parties. The facilitator should not be asked by the sponsoring agency, or any other participant, to serve as their agent, or to act in any manner inconsistent with being accountable to all participants.

The impartiality and process management skills of a facilitator are particularly important in agreement-seeking processes. It is here that the facilitator serves as an advocate for and guardian of the underlying principles of collaborative agreement-seeking processes. Appendix 4 provides a list of best practices that govern facilitator or mediator conduct in agreement-seeking processes.

When the issue at hand is highly contentious or when participants have limited trust in other participants, a facilitator plays a particularly important role in establishing and maintaining the credibility of the process. A credible process is often either established or undermined in the early stages by such factors as how and by whom the facilitator is selected, how and by whom the participants are identified and invited, and how and by whom the process is planned and structured. Under these conditions, a facilitator for an agreement-seeking process should be independent of the sponsoring agency.

If an agency considers using a facilitator from within government (whether inside or outside the sponsoring agency) several questions should be asked: Is it likely participants will regard the facilitator as unbiased and capable of being equally accountable to all participants? Will the facilitator be able to act independently, or will he or she be under the direction of the agency? Will participants feel comfortable consulting or confiding in the facilitator when the going gets tough?

If an outside facilitator is to be engaged by the agency, that decision should be made early enough to enable them to conduct the pre-negotiation assessment and planning. Ideally, participants in the process should be involved in selecting and paying the facilitator. For many policy-making processes, however, it is common for the agency to pay the facilitator. Other participants need to be aware of this arrangement and comfortable that it does not jeopardize the impartiality of the facilitator.

When a government agency engages a facilitator for a public policy dispute, the participants may not be involved in the selection process because of procurement requirements or because participants have not yet been identified. Under these circumstances, ground rules can include procedures to enable participants to review the facilitator's qualifications, to evaluate performance, and/or to replace the facilitator at any time during the process if participants feel that she or he is biased or ineffective.

The selection criteria for facilitators or mediators should be based on experience, skill and ability, and acceptability to participants, and not solely on costs. Lump sum or fixed price contracts may not be the best mechanisms for hiring this kind of professional. Until the assessment is complete and a process designed, it is very difficult to predict the exact number of hours of effort needed to work with participants toward reaching agreement. Procurement mechanisms ought to be made flexible enough to allocate additional time and funds as warranted, with a minimum of time and effort, so as to not slow down or halt the negotiation process.

Contracts should be negotiated and executed before the facilitator begins any work. Facilitators and sponsoring agencies should assume that all contracts could be read by all participants without destroying trust on any side. Contracts should assure that the facilitator has latitude to act independently of the sponsoring agency and should not constrain his or her ability to communicate with all participants.

Recommendation 7: The Agency and Participants Should Plan for Implementation of the Agreement from the Beginning of the Process

There are two aspects of implementation: formal enactment and actual implementation. Planning for implementation is integral to the process.

One of the key reasons agencies decide to sponsor collaborative agreement seeking processes is to improve implementation. Many agreements developed through collaborative processes are in fact a set of recommendations that need formal adoption. Implementation can be problematic if steps are not taken from the beginning to ensure linkages between the collaborative process and the mechanisms for formalizing the agreements reached.

The implementation phase of an agreement should be taken into account as part of the assessment and preparation phase. The likelihood for successful implementation is greater when those responsible for implementing the agreement are part of the process, or are kept informed about the process. The agreement itself should set out clear steps and stages for implementation: clarifying tasks, resources, deadlines, and oversight responsibilities.

Recommendation 8: Policies Governing These Processes Should Not Be Overly Prescriptive

Policymakers should resist enacting overly prescriptive laws or rules to govern these processes. In contrast to traditional processes, consensus-based processes are effective because of their voluntary, informal and flexible nature.

The kinds of processes encompassed by these recommendations occur within the framework of traditional policymaking practices in a representative democracy. They are adjuncts to—not replacements for—traditional practices. Collaborative approaches are based on participants willingness to come together voluntarily to explore ways to reconcile competing and conflicting interests. This kind of exploration is not likely to happen in an atmosphere where people are required to participate or where their manner of participation has been narrowly prescribed.

Therefore, when legislation, rules and guidelines are developed concerning these processes, they should be limited to encouraging the use of collaborative agreement-seeking processes, and setting broad standards for their use. Overly prescriptive or burdensome guidelines can act as a disincentive to participation. Flexibility in designing and carrying out these processes is a factor necessary to their success. While there are situations when enabling legislation or rules can play a role in overcoming agency reluctance to initiate mediated approaches, over-codifying them will diminish the effectiveness of these flexible tools.

CONCLUSION

These recommendations are intended to help agencies and practitioners conduct more effective collaborative agreement-seeking processes. They represent an effort to harvest lessons from the experience of facilitators and mediators over the past two decades and apply them to the challenges and barriers to success that have been observed. It is hoped the recommendations will help lay a foundation for widespread adoption of these approaches by ensuring their quality and integrity.

Appendix 1

Agency Checklist for Initial Screening to Determine Whether to Proceed

If the following factors are present, an agency can proceed toward the assessment phase:

1. The issues are of high priority and a decision is needed.

2. The issues are identifiable and negotiable. The issues have been sufficiently developed so that parties are reasonably informed and willing to negotiate.

3. The outcome is genuinely in doubt. Conflicting interests make development or enforcement of the proposed policy difficult, if not impossible, without stakeholder involvement.

4. There is enough time and resources. Time is needed for building consensus among conflicting interests, and resources are necessary to support the process.

5. The political climate is favorable. Because these kinds of negotiations discussions occur in the political context, leadership support and issues of timing, e.g. elections, are critical to determining whether to go forward.

6. The agency is willing to use the process.

7. The interests are identifiable. It will be possible to find representatives for affected interests.

APPENDIX 2

Guidelines for Conducting the Assessment and Preparation Phase of an Agreement-Seeking Collaborative Process

The sponsoring agency should seek the assistance of a facilitator experienced in public policy collaborative processes to conduct this phase of the process before initiating other activities. The following tasks should be accomplished:

1. The agency and facilitator should jointly evaluate whether the objectives of the sponsoring agency are compatible with and best addressed by a collaborative process.

2. Develop a statement outlining the purpose of the collaborative process, and its relationship to the sponsoring agency's decision-making process for communication to other potential parties.

3. Assess whether sufficient support for a collaborative process exists at the highest possible levels of leadership within the sponsoring agency.

4. Identify parties with an interest in the objectives and issues outlined by the sponsoring agency, and examine the relationships among the various interest groups and the agency.

5. Interview potentially affected interest groups and individuals to clarify the primary interests and concerns associated with the issues, and related informational needs.

6. Assess deadlines, resources available to support the process and the political environment associated with the issues and stakeholder groups.

7. Evaluate the influences of racial, cultural, ethnic and socio-economic diversity, particularly those that could affect the ability of interest groups to participate on equal footing.

8. Identify if assistance is needed by any interest group(s) to help prepare for or sustain involvement in the process.

9. Clarify potential obstacles to convening the process (e.g., non-negotiable differences in values, unwillingness of key stakeholders to participate, insufficient time or resources).

10. If no major obstacles are apparent, propose a design for the process including the proposed number of participants (based on the range and number of major interest groups); the process for identifying and selecting stakeholder representatives; structure of the process (e.g., a committee with work groups); projected number and frequency of meetings; a preliminary overview of the process (e.g., identify issues, clarify interests, joint fact-finding, brainstorm options); summary of resources anticipated and available to support the process; potential roles of the sponsoring agency, other participants and the facilitator; proposed meeting protocols; draft agenda for the first meeting; etc.

11. Prepare a report highlighting the results of the assessment as the basis for the sponsoring agency to decide whether or not to proceed. This may include actions by the sponsoring agency to respond explicitly to requests from other interest groups to include additional objectives or issues in the process. Under most conditions, the assessment report should be shared with the

other process participants as well.

12. Pursue commitments of potential participants based on the assessment, proposed agency objectives, preliminary process design and their willingness to participate in the collaborative process in good faith.

13. If a major stakeholder group chooses not to participate, evaluate the implications of their non-participation with the sponsoring agency and other participants, recognizing that the process may not be able to proceed.

14. Allow the participants an opportunity to concur with the sponsoring agency on the person(s) selected to facilitate the process.

15. Incorporate participant responses into the proposed process design, meeting protocols and meeting agenda for initiating the next phase of the process.

Steps 12-15 may occur as part of an organizational meeting of all parties during which the parties jointly decide to proceed and plan future phases together.

After completing the assessment and preparation phase, resolving any major obstacles to the process and obtaining the commitment of the sponsoring agency and major stakeholders to proceed, conditions are appropriate for moving forward.

Appendix 3

Formulating Ground Rules for Agreement Seeking Processes

Ground rules usually address the following issues:

1. The purpose and scope of the process.

2. Participation: role of agency staff; whether participation of alternates is permissible; provision for inclusion of new parties; observers; other interested parties.

3. The roles of participants: whether all participants will have relatively equivalent status.

4. Decision rules: the meaning of consensus as well as what will happen if consensus is not reached.

5. The end product: gaining ratification; what the agency will do with the agreement; the degree of commitment by participants to abide by any agreement.

6. Understandings about participants' activities in other proceedings: whether 'good faith' participation will constrain the activities of participants or their constituents in other forums, such as a legislative session, administrative hearing or judicial proceeding.

7. Responsibilities of representatives for keeping their constituencies informed and gaining ratification of agreements reached at the negotiating table.

8. Informing those not at the table: who will be kept informed of progress and how this will happen.

9. Organization and conduct of the meetings: agendas; record keeping; responsibilities of the facilitator.

10. Selection and removal of the facilitator: the role of participants in the selection, evaluation or payment of a mediator or facilitator. Provision for replacing the facilitator if the participants feel he or she is biased or ineffective.

11. Withdrawal of a participant: If a participant withdraws, everyone left at the table should determine whether the process can go forward. If the participants want some other default procedure, they should agree to it beforehand and include it in the protocols.

12. Communications with the media: how and by whom.

13. The timetable or schedule.

14. Provision for use of caucuses.

15. Information: provisions for sharing information; confidentiality.

J. Consensus

K. Ground Rules

L. How ADR Proceeds

M. Sources of Practitioners

Section J. Consensus: What Does It Mean?

CONSENSUS

What does it mean?

One of the first decisions Federal land management managers must make in deciding what type of process they propose to use is whether they are seeking consensus from the other stakeholders (collaborative-decisionmaking, consensus-building), or are they only seeking stakeholder opinions about a proposed management action.

If Federal managers decide it is important to seek consensus from the stakeholders, there are several methods how consensus is measured.

> **Consensus means whatever the parties in a dispute prevention or resolution process decide it means.**

Consensus can be achieved by informal agreement by the parties through prior coordination or as the parties negotiate for small groups. For large groups, more formal definitions could be needed. Consensus arrangements may be made as part of the discussion and acceptance of ground rules or as a separate issue of business. Consensus arrangements often depend on the parties sophistication with the ADR process and on the size of the group.

Small party situations: When only a few parties are involved (e.g. a mediated dispute), it is probably both practical and wise for the parties to agree among themselves upon a definition and process for measuring consensus. The parties may use one of the consensus definitions described below or design one for their particular situation. This decision could be a part of the ground rules for the process.

Large party situations: When a large number of stakeholders are involved in a collaborative decisionmaking process (e.g. a land use plan) and the stakeholders are not able to consistently participate in face-to-face meetings, it may be impractical for the parties to decide on a definition and process for measuring consensus. This is particularly true for meetings conducted thru video and electronic means from a number of sites. In this case, agency managers could use one of the commonly accepted definitions of consensus or define definitions specific to a particular situation.

Consensus Definitions:

A. Four levels

1. I agree with the (statement, proposal, etc.) and will fully support it.

2. I can support the (statement, proposal, etc.), but I am not in complete agreement with it.

3. I do not agree with the (statement, proposal, etc.), but I will not oppose its adoption.

4. I do not agree with the (statement, proposal, etc.) and will actively oppose its adoption.

Selection of options 1, 2, and 3 by all participants usually is defined as having achieved consensus.

B: Six levels[1]

1) Agree: An unqualified "yes" to the (statement, proposal, etc.). The participant is satisfied that the decision is an expression of the wisdom of the group.

2) Agree: The participant is satisfied that the (statement, proposal, etc.) is acceptable.

3) Agree: The participant can live with the (statement, proposal, etc.) but is not particularly enthusiastic about it.

4) Agree (Yes, but): The participant does not fully agree with the (statement, proposal, etc.) and needs to register a view about it. However, will not choose to block the (statement, proposal, etc.). Is willing to support the (statement, proposal, etc.) because of trust in the wisdom of the group.

5) Disagree: The participant does not agree with the (statement, proposal, etc.) and feels the need to stand in the way of this (statement, proposal, etc.) being accepted.

6) Disagree: The participant feels no clear sense of unity in the group and feels the need for more work before consensus can be reached.

Selection of options 1,2, 3, and 4 by all participants usually is defined as having achieved consensus.

These definitions of consensus can also be used to record and categorize stakeholder comments, even when the agency is not seeking consensus. The Internet based program by the Nuclear Regulatory Commission "RuleNet" can be used to augment traditional participation techniques to gather this information electronically.

A 1996 publication by Gerald Cormick, et.al. is an excellent and in depth discussion of consensus building. The publication is entitled Building Consensus for a Sustainable Future: Putting Principles into Practice, Ottawa, Canada, National Round Table on the Environment.

---

[1]Adapted from the RuleNet program of the Nuclear Regulatory Commission

Conduct of the parties: Ground rules often require the parties to agree to show courtesy to each other, to refrain from using vulgar or inflammatory language, to adhere to all the ground rules, and to listen without interrupting the other parties when it is the other sides turn to speak.

Consensus: Ground rules can be used to define consensus, when consensus polls are to be taken, and how non-consensus positions will be addressed. (See Section J, Consensus: What Does it Mean? in this tool kit)

Documentation. If note-taking is needed, who keeps notes, in what format, and for what purpose. The parties can establish rules for the manner in which the ADR event is to be recorded, who will do the recording, if and how the notes will be retained, and how the recorded dialogue will be disseminated, if at all. If the agreements require follow-up documentation, who will be responsible for finalizing the document, getting required signatures, and distributing the agreements?

Caucuses: The ground rules may lay out if, when, how, and where caucuses will be used. Typically they may address who can call a caucus, who participates in the caucus, i.e. does the neutral participate or only the parties. (Caucuses with the neutral in large facilitated public ADR events can raise the issue of neutrality and violations of FACA and other open-meeting concepts.)

Confidentiality: If confidentiality is an issue, how is it maintained and enforced? One technique is to get the parties to agree to only discuss their position and facts outside the ADR event. Another is to agree to sanctions for those who may purposely or inadvertently violate a confidential communication.

Media coverage: Ground rules may be developed to control media relations. These could include designation of one member of the group or the neutral as the only party who will talk to the media during the course of the ADR event. Another technique could be to agree to restrict comments to the media until the ADR process has concluded. Still another technique could be for each party to agree to discuss only their issues, facts, and points of view with the media.

Relationship to other activities on the same or closely related issues. An ADR event is not conducted in a vacuum. The parties may need to agree how they will act in relation to the issues in other forums such as legislative hearings, on-going litigation activities, and requirements imposed by their higher headquarters.

Breaks and adjournment issues: Ground rules can be used to establish break times, and how and by whom adjournment will be called.

How ADR Processes Proceed

Each alternative dispute resolution (ADR) process has a general format or set of procedures that are typical to the process. The objective of this paper is to provide agency personnel with a brief description of the manner in which a process could proceed. The mediation process is described below in detail because it represents a "midway" process in the dispute-prevention, dispute-resolution spectrum. Facilitated events follow the concepts outlined for the joint meeting mediation format, but generally are less formal in structure. The role of the facilitator is more to control the pace of the meeting and potential disruption, than to become involved in guiding parties to a resolution. Arbitration shifts decisionmaking from the parties to a selected neutral, the arbitrator. The use of arbitration in the resolution of natural-resource, public-land management disputes is an unlikely option and therefore the process is not discussed.

It is incumbent of all agency personnel to understand how a process works so they can be prepared to represent the agency in the best possible light. Many processes, particularly preventative processes and agency-initiated mediation, allow agency managers more flexibility in scheduling, format, and other aspects of using a particular ADR process. (Some processes, such as settlement conferences convened by a Federal district court judge or magistrate, remove virtually all flexibility from agency management, the US Attorneys, and other party representatives, and they all can be required to appear and participate regardless of schedule conflicts.)

Facilitation as a tool in collaborative decisionmaking.

In its best form, collaborative decisionmaking is initiated as a dispute prevention activity. In this context the initiators of the activity are proactive. The initiators need to carefully assess the attitude of the stakeholders. If the climate in which they initiate the activity is not polarized, distrustful, or hostile toward the agency, there may be no need to use a neutral facilitator. In these cases, the initiator may be the federal agency and it may be appropriate to use agency personnel to facilitate the meetings used to collaborate with the other stakeholders. If, however, the climate is polarized, distrustful, or hostile toward the agency(s) the initiators should carefully weigh the need to use a neutral facilitator. The agency may also seek out another group or organization to take the lead in organizing the activity as a means to deal with polarized, distrustful, or hostile stakeholders. Initiators of a collaborative decisionmaking activity or who are participating with other stakeholders to organize an activity may find it helpful to consider the elements listed in Section I, Convening an ADR event.

The agency may also be an invited stakeholder, invited by a citizens coalition, another federal agency, local or state government, or other group to join in a collaborative process. The facilitator of the activity may be selected from within the group, selected / appointed from one of the agency staffs, hired as a professional facilitator, or chosen by other means such as natural selection.

Collaborative decisionmaking also may be used as a dispute resolution activity. In this context, the climate in which the activity is being initiated may be highly polarized, distrustful, or hostile toward the agency(s). In this scenario, the issue of neutrality is likely to be very significant and the use of professional non-government facilitators may be the prudent course of action. Depending on the number, geographical location, and availability of the stakeholders, it may be possible to involve the stakeholders in the selection of the facilitator. In activities that have a large number of people and a dispersed group of stakeholders as commonly found in land use planning, it becomes an agency responsibility to select and retain the services of the facilitator. Agency personnel must remain vigilant and continually validate the effectiveness and acceptance of the facilitator and the processes the agency and facilitator have chosen to use.

The organization and operation of a facilitated collaborative decisionmaking activity is dependent upon the specific situation in which the activity is occurring, and the persons who are initiating the activity should consider the factors listed in Section I, Convening an ADR event, before initiating the activity. A specific collaborative decisionmaking activity in a BLM office or any other federal, state, or private sector organization may look very different from other collaborative decisonmaking activities, including those in the same district or state, or even in the same office whenever collaborative activities are initiated about other issues or during different times. In other words, while collaborative decisionmaking activities follow certain principles, each has a life and structure of its own, born of and nurtured in the climate in which the activity occurs.

In general facilitated collaborative decisionmaking activities proceed as follows:

Assessment of the issues. Formal or informal studies may be made by the initiator(s) or by ADR professionals retained to conduct the assessment. For example, in a case in Idaho, the distrust of the agency was so intense that the agency retained a professional facilitator to conduct public meetings using focus groups to conduct the assessment and then recommend how to proceed with the next step to resolve issues related to the development of a resource management plan. In any case, assessment is a management function that can be carried out in many ways, but it always needs to be done..

The facilitated activity may be organized by using a memorandum of understanding (MOU), memorandum of agreement (MOA), another form of a formal charter developed by the parties, informal agreements, or in accordance with an agency's planning guidelines. The formality of the agreement to collaborate all depends on factors such as the mood and sophistication of the stakeholders, the degree of cooperation or polarization on the issue, past relationships among the parties, time factors, and legal or administrative rules and requirements such as the National Environmental Policy Act.

Neutral facilitators may be tasked to do a variety of tasks from the beginning of an activity to its conclusion. These tasks may include conducting the assessment phase, educating stakeholders, planning and running meetings, recording and summarizing comments, drafting statements or agreements, and securing the appropriate signatures on agreements.

Mediation. Mediation involves at least three parties and is generally used to resolve rather than prevent disputes. The mediation activity may only include one person for each side of a two-party dispute and the mediator, or the mediations may involve a large number of individuals or interests and the mediator. A lot of work is required to convene a mediation event. The steps in convening are discussed in detail in Section I, Convening an ADR Event in this tool kit.

The Mediator: The mediator is a neutral party who has no decisionmaking authority, and who has been selected by the parties in dispute as follows; 1)from a list developed by one or both of the parties, 2) from a standing list maintained by a court or other organization such as the American Arbitration Association or 3) by appointment by a contract provision or court procedure. The most likely process for selection of a mediator(s) in BLM would be as described in 1) and 2) above. The mediator may be one person or a panel of several persons, typically three. The essential qualities of a mediator are that the mediator is perceived as being neutral by all parties and the mediator has the skill and knowledge to conduct the mediation process. There is an ongoing debate among ADR professionals whether or not the mediator needs to have subject-matter knowledge about issues in dispute and be familiar with the culture in which the dispute arises. In general, a mediator who has subject-matter knowledge, and who is familiar with the culture in which the dispute has arisen probably will be more successful. This does not preclude the parties from selecting a mediator who does not meet these criteria, but who has both the trust and respect of the parties.

The Parties: An essential element of a successful mediation is the participation at the "table" by party representatives who have the authority to settle the dispute. The principles for each of the sides in a dispute should be active participants to the mediated negotiations. Attorneys for the parties may or may not speak for their clients. They may be at the table, may be in the background acting as advisors for their clients, or be assigned to wait in another room. The role of attorneys should be discussed during the convening process and can be discussed as part of the ground rules.

The Mediation Process: The mediation process has three essential parts: the opening phase, the discussion phase, and the conclusion or wrap up phase. Also, mediation processes are conducted in three basic formats as discussed below. The formats are generally based on either precedent, sector or industry culture, or mediator style and preference, or a combination of these.

The joint meeting format. In this format all parties to the mediation meet face to face at the same table. With the assistance and expertise of the mediator, parties move through explanations of their interests, a discussion of the issues, and eventually to agreement between the parties to resolve their differences. At the opening of the process the mediator explains the mediation process and how he or she plans to conduct the mediation. The mediator establishes, with the parties agreement, the ground rules to be followed and addresses other preliminary matters such as time constraints and how to deal with them. The mediator and the parties remain in direct communication with each other and no exparte (one-on-one) communications are made between the mediator and either of the parties.

In a typical joint meeting format, the mediator initially asks the parties to direct all comments and

discussion to the mediator. As the process proceeds, it is typical for the parties to grow more comfortable with each other and begin direct communication between themselves. If the parties in dispute willingly chose to begin constructive dialogue between themselves, the mediator withdraws from the dialogue, ever vigilant to redirect the parties discussion back to him or her if communications between the parties begins to break down. The dialogue of the mediation may cycle through several phases in which the mediator redirects the dialogue back to the mediator. If the parties don't begin a natural move to been dialogue between themselves, the mediator uses one or more techniques to encourage direct dialogue between the parties. The role of the mediator is to establish and maintain fruitful communication between the parties.

Listing to parties vent frustrations and anger is a typical part of the mediation process. The mediator must allow some venting but control the venting. It is very important for the mediator in the joint meeting format to sense when enough time has been spent on venting. The mediator will allow some venting to occur and use the ground rules to control venting so that it does not get out of hand. Most of the time in a joint meeting format is consumed by venting and active dialogue between the parties. If the mediation is successful, the development of agreements typically occurs quickly in the very last part of the process, say the last hour of a day-long process. Some parties in post evaluations characterize the majority of the time spent as wasted and see only the last part in which they were able to reach agreement as the only value they got out of the process. They often fail to recognize the critical value of the venting and listening that takes place during the course of the mediation.

The mediation typically ends by the parties agreeing to a specific set of agreements. These agreements may be finalized in writing and signed at the end of the mediation session , or, more typically, the convener, one of the parties, or the mediator will take the agreements and have them reduced in writing in a format that is acceptable to the parties. Specific time lines are often established for the conclusion of the process and agreements are made about who will get the appropriate signatures on the agreements. The main point to remember in all mediations is all decisions are made by the parties, not the mediator.

The separate room format: In this format the parties rarely, if ever, meet face to face. The mediator shuttles between the rooms where the parties reside carrying positions and expressing the concerns of one party to the other party. The mediator deals with the venting process by each of the parties directly with them and in confidentiality. In this process the mediator needs to pay special attention to confidential communications expressed by the parties and develop a system to ensure that he or she does not inadvertently reveal confidential communications to the other party. This format is typical for commercial mediations, particularly when organizational guidelines, mediator styles, and cultural norms dictate the format. This process seems to be preferred by attorney mediators. The conclusion and wrap up of this process is similar to the process followed for the joint meeting format.

The caucus format: The caucus format is a combination of the joint meeting and separate room formats. Typically mediations in this format begin in the joint meeting format and parties also agree to meet separately with the mediator (caucus) as the need arises. The need for caucus can be suggested by either the mediator or the parties The mediation can also begun with separate

meetings, move to joint meetings, and then to caucuses. The parties may also agree to conduct the mediation in separate rooms for the bulk of the negotiations, except perhaps for the final agreement stage. Caucus can also mean that the parties meet separately with their counsel and other advisors without the mediator to discuss offers and other matters among themselves.

When the mediator meets in caucus with one of the parties, this provides the mediator with the opportunity to ask the parties to review their positions in terms of real possibilities of success. In short, the mediator is conducting reality checks. The mediator may ask the parties to realistically review the advice their attorneys have given them about the potential of winning without negotiation, and what their best option for resolution of their differences is if the mediation is not successful, their "best alternative to a negotiated agreement" or BATNA. Maintenance of confidentially of information obtained by the mediator in caucus is a critical issue, and the mediator must have a process to ensure that he or she does not violate any confidences given in caucus. The caucus is often used to allow a party to vent frustration without inflicting it upon the other party and thereby causing the other party to harden their position or withdraw from the mediation. The caucus format is concluded and wrapped up in the same manner as the other two formats.

Sources of Private and Public Alternate Dispute Resolution Practitioners

Neutrals, Situation Assessment Assistance, and Trainers

Assessment of the qualifications and suitability of an ADR practitioner for a BLM ADR event is often a difficult task. The professional ADR community has labored over how to evaluate and certify ADR practitioners. Various approaches have been tried but none have been accepted as the best way to evaluate or "crystal ball" the potential success of a particular ADR practitioner in a particular situation. Some jurisdictions have used education and training as basis for evaluation or certification, others have used membership in an organization(i.e. a state bar association) as a principal criteria for qualification. Other groups have maintained "rated" lists of names of practitioners and limited selection of practitioners to those who have been placed on the approved list. Also, some certification bodies require understudy and training in specific subject matter. Other groups or jurisdictions rely on the market place, through references and word of mouth, to define qualifications and suitability. This is the approach taken in this tool kit, with the addition of a registration form that gathers key information about an ADR practitioner. The intent of the form is to provide BLM managers and staff with information about past activities and, **most importantly**, the names and phone numbers of people (stakeholders) who have had a chance to see the ADR practitioner in practice. Completed forms can be viewed on the Natural Resource ADR Home Page at: www.blm.gov/nradr.

There is no intent to limit selection of an ADR practitioner to those who have submitted a registration form to BLM. These forms are included to assist in qualifications determination, not to determine or dictate who is qualified to work with BLM.

The attached forms have been submitted by ADR practitioners who are interested is working with the BLM as neutrals, in situation assessment, or as trainers. You are asked to encourage ADR practitioners you believe would be a successful ADR practitioners for a BLM ADR event to register with BLM. Copies of these forms will be maintained on the Natural Resource ADR Initiative Home Page.

Other sources of information about ADR practitioners can be found in the arbitration and mediation services listings in the Yellow Pages. Martindale and Hubbell (908) 464-6800 produce an annual volume which lists ADR practitioners. This volume can be found in law libraries and some public libraries. The Society of Professionals in Dispute Resolution (SPIDR), 815 15th Street, N.W. Suite 530, Washington, D.C., telephone (202) 783-7277 has an extensive membership directory. SPIDR also has regional chapters that may be of assistance. You can get your area's chapter address from the national office in Washington, D.C.. Many states also have state associations such as the Montana Consensus Council, Office of the Governor, (406) 444-2075; the North Dakota Consensus Council Inc, 1003 Interstate Avenue, Bismark, North Dakota,

be reached through the North Dakota Consensus Council; The Idaho Mediation Association, telephone (208) 389-9211; the Colorado Council of Mediators and Mediation Organizations, telephone 1-(800) 864-4317; and the Oregon Dispute Resolution Commission, PO Box 247, Salem, Oregon, telephone (503) 378-2877. The American Arbitration Association (AAA) also maintains panels of mediators, arbitrators, and other dispute resolution practitioners. AAA has a number of regional offices and they are listed in the yellow pages of most major cities.

Included in this information is a list of BLM employees who are capable of acting as facilitators whenever their use would not cause problems with perceptions of neutrality.

UNITED STATES DEPARTMENT OF THE INTERIOR
Bureau of Land Management
National Special Projects & Initiatives Team
PO Box 25047, Denver, CO 80225-0047

October 1996

SOURCES SOUGHT:

The Bureau of Land Management (BLM) is building a data base of alternative dispute resolution (ADR) practitioners who may be interested in assisting the BLM in training and in conducting ADR events in the field of Environment and Public Policy Dispute Prevention and Resolution. If you are interested in registering with the BLM, please see the registration form, similar to the one below, at BLM's web site. A home page on the Internet, will have this form and will be the sole means of registering with BLM. ***The web site is: www.blm.gov/nradr.*** **This is not a solicitation for work.**

Name of Organization: _____
Address:_____
City:_____State: ___Zip Code: _____Telephone No: (___)_____
Fax No; (___)_____E-Mail Address: _____
Contact Person in Your Organization _____
Number of Professional Practitioners in your Organization: _____
Area of interest:

Training in: Negotiation____ Facilitation ___ Mediation __Fact finding ____
Dispute Resolution System Design ___ Situation Assessment____

Practice in: Negotiation ____Facilitation ___ Mediation __ Fact finding ____
Dispute Resolution System Design ___ Situation Assessment_____

Geographical area of Interest: Northeast U.S.___, Southeast U.S.___ , Midwest U.S.____ , Southwest U.S.___ _ Northwest U.S.____, Nationwide ___

Certifications (who issued, and year issued) and ADR qualifications:

Do you belong to an ADR association that has Standards of Ethics for your profession? If so, what is the organization.

You can contact Dr. John Schumaker at (303) 236 0170 or (719) 481-4728 or Steve Shafran at (303) 236-6694 for additional information.

Name of Organization _____

Your Experience: List the three most significant environmental and public policy ADR activities in which you or your organization has participated.

1) a. Type of ADR Event _____ Year Event occurred ____ No. of participants _____

b. Identify key stakeholders (agency, company, organization, etc.) and key contact person and phone number for each of the stakeholders:

c. Synopsis of the event and outcome:

d. Comments:

Name of Organization _____

2) a. Type of ADR Event _____ Year Event occurred ____ No. of participants _____

b. Identify key stakeholders (agency, company, organization etc.) and key contact person and phone number for each of the stakeholders:_

c. Synopsis of the event and outcome:

d. Comments:

Name of Organization _____

3) a. Type of ADR Event _____ Year Event occurred ____ No. of participants _____

b. Identify key stakeholders (agency, company, organization, etc.) and key contact person and phone number for each of the stakeholders:

c. Synopsis of the event and outcome:

d. Comments:

BLM employees who are trained / experienced as meeting facilitators.

Employees listed below are trained / experienced as facilitators. This list is provided in the event a BLM manage or persons in other Federal agencies want to use their services to assist with a facilitated negotiation or meeting. Managers who choose to use agency personnel as facilitators, particularly when non-BLM stakeholders will be involved in the ADR event, need to weigh carefully the neutrality issue. BLM employees who serve as facilitators, no matter how skilled or personally neutral they may be, may create a perception of bias for the other stakeholders that will damage the process and prevent success. Gaining permission of the employee's supervisor is, of course, an essential step in using one of these facilitators.

Name	Job Title	Grade	Office	Phone No.	Supervisor	Phone No.
Nancy Golden	Assoc DM	14	Salt Lake DO	(801)977-4300	Deane Zeller	(801) 977-4300

Standards of Ethics and Conduct for ADR Neutrals

Many ADR neutrals belong to professional associations that require neutrals to agree to follow their standards for conduct and practice. Standards have been promulgated by organizations such as the Society of Professionals in Dispute Resolution, the American Arbitration Association, Bar Associations, and many state-based associations such as the Idaho Mediation Association.

These standards can help those seeking to use an ADR neutrals to understand the role of the neutral. For example, standards for mediators spell out expectations of neutrality, confidentiality, and other principles of the mediation process.

Attached are two examples of standards that have been adopted by professional ADR organizations.

IDAHO MEDIATION ASSOCIATION
STANDARDS OF PRACTICE FOR IDAHO MEDIATORS

Preamble

Mediation is a process by which a neutral third party facilitates the resolution of conflict between two or more parties. Mediators must be qualified and impartial. Decision making authority rests at all times with the parties. The parties should have clear and sufficient information so that they can make informed decisions.

A mediator facilitates the clarification of interests and exploration of alternatives. The mediator does not make decisions for the parties. A mediator's role is to raise questions for consideration by the parties including questions of fairness and feasibility of settlement options.

A mediator's function is distinct from the role of legal advisor, representative or therapist. The mediation process is distinct from processes involving arbitration, litigation, evaluation or recommendation.

These standards are intended to assist and guide public, private, voluntary and mandatory mediation. It is understood that the manner of implementation and mediator adherence to these standards may be influenced by variations in local law, court rule, or standards of other professions.

The Idaho Mediation Association views these standards as minimum standards that can reasonably be expected of mediators holding certificates issued by the Association. Mediators who are not Idaho Mediation Association certified are encouraged to abide by these standards when acting in a meditative capacity.

I. Facilitating the Process

1. Educating Parties About Mediation

A mediator has a duty to educate parties about the mediation process so that parties understand the differences between mediation, arbitration, and other forms of conflict resolution, as well as therapy, counseling, or legal representation.

2. Appropriateness of Mediation

A mediator has a duty to assess the parties' willingness and ability to mediate. A mediator will help the participants evaluate the benefits, risks and costs of mediation and the alternatives available to them. If mediation is inappropriate, the mediator must decline to mediate and suggest parties seek another conflict resolution process. This is a continuing and on-going duty of the mediator.

3. Responsibility to Absentee Parties

A mediator will make reasonable effort to assist the parties to consider the interests of absentee parties who are not being represented in the mediation process but will be affected by the subsequent outcome.

4. Identification of Issues

A mediator has a duty to gather information from the parties and assist them to mutually define and agree on issues to be addressed in the mediation.

5. Duty to Disclose

Prior to the mutual agreement to commence, the mediator must disclose to parties any biases or strong views relating to the issues to be mediated. This is a continuing and ongoing duty of the mediator.

A mediator has a duty to assess his or her own ability and willingness to undertake mediation with the particular parties and the issues to be mediated. The mediator shall disclose experience, training and any allegiance to participating parties.

6. Disclosure by the Parties

A mediator will insist upon disclosure of relevant information in the mediation process. If the mediator believes the parties are not acting in good faith, he or she may suspend or terminate the process.

7. Procedures

A mediator should reach an understanding with the parties regarding the procedures to be followed in mediation. This includes, but is not limited to the use of joint or separate sessions, caucus, confidentiality, involvement of additional parties, legal services, and conditions under which mediation may be terminated.

Through verbal or written mutual agreement, the mediator and parties must define the rules by which the mediation is conducted. The duties and responsibilities of each participant should be clear.

The parties should understand that they (individually or collectively) or the mediator has the right to voluntarily suspend or terminate the process at any time.

8. Costs and Fees

A mediator has a duty to explain fees for payment of services. Mediation is not based on contingency fees or percentages of the outcome of the settlement. When setting fees, the mediator assures that they are explicit, fair, reasonable and commensurate with services to be performed. Any unearned fees will be promptly returned to participants.

No commissions, rebates, or similar forms of remuneration are given or received for referral of clients for mediation services.

9. Independent Legal Counsel
Mediators should encourage parties to seek independent legal counsel during the process, if appropriate, and will inform the parties that mediation is not a substitute for legal counsel.

II. Confidentiality

1. Exchange of Information
A mediator has a duty to foster the confidentiality of the process unless all parties agree to share information under specific circumstances.

2. Duty to Report
In relevant cases, a mediator must inform the parties that he or she is compelled by law to report to appropriate authorities information about child abuse, neglect or abandonment. Mediators are strongly encouraged to report to the appropriate authorities threat of injury to self or others, unless required to do so by other professional standards.

3. Legal Testimony
A mediator will refrain from testifying at court proceedings without the consent of all parties. However, the mediator should explain to the parties that he or she may be compelled to testify as a result of judicial rule.

4. Storage and Disposal of Records
A mediator has a duty to store and dispose of records in a confidential and professional manner.

5. Release of Information
A mediator shall obtain mutual written consent of parties prior to release of information to others.

When records concerning mediations are used for research or training purposes, the mediator will maintain participant confidentially and render anonymous all identifying information.

III. Impartiality

1. Prior Relationships
A mediator will disclose to the participants any prior affiliations he or she may have with parties prior to the start of mediation. If prior services have been provided to any of the participants, mediation will not proceed until the relationship has been discussed, the role of the mediator has been made distinct from the earlier relationship, and the participants voluntarily agree to proceed with mediation.

2. Post-Mediation Relationships

A mediator should be aware that post-mediation professional or social relationships may compromise the availability of the mediator as a neutral third party.

3. Independence of Mediator From Other Professional Roles

A mediator who is an attorney, mental health, or other professional shall not represent or counsel either party during or after the mediation process in matters pertaining to the instant mediation. The mediator should refer these issues to appropriate outside resources.

4. Conflict of Interest

The mediator will have no financial or other interest in the outcome of the mediation other than the agreed upon fee arrangement. A mediator must disclose any circumstance to the participants that might cause a conflict of interest.

5. Promotion of Understanding

The primary responsibility for the resolution of the dispute rests with the participants. The mediator has a duty to assist the participants in reaching an informed and voluntary settlement.

At no time should a mediator coerce a party into agreement or make a substantive decision for any participant. The mediator will promote understanding and will assist the parties in disclosure of relevant information prior to reaching agreement. The mediator may recommend that parties obtain expert consultation when additional knowledge or understanding is necessary.

6. Providing Professional Advice

A mediator may provide information where qualified by training and experience. The mediator should only provide an interpretation or advice based upon the mediator's area(s) of expertise.

IV. Concluding Mediation

1. With Agreement

When participants reach mutual agreement, the mediator will discuss the process for formalizing and implementing the memorandum of understanding. When partial agreement is reached, the mediator will discuss the procedures available to resolve the remaining issues.

2. Without Agreement

If the mediator determines that the parties are unable or unwilling to participate in meaningful discussion or if they reach impasse the mediator should terminate the process. If the process is terminated the mediator may assist the parties in determining the next step and may refer them to other appropriate resources.

V. Publicity and Advertising

1. Truth in Advertising
A mediator will not make false or misleading statements regarding his or her own abilities and qualifications, or about the mediation process and its costs and benefits.

VI. Professional Relationships

1. Relationships with other Mediators
In situations where more than one mediator is participating, each has a duty to keep the other informed of developments essential to a cooperative effort.

2. Relationships with other Professionals
A mediator should respect the complementary relationship between mediation and legal, mental health, and other social and medical services and should promote cooperation with other professionals.

VII. Training and Continuing Education

1. Training
A mediator has a duty to acquire substantive knowledge and procedural skill in conducting the basic mediation process as well as areas of specialization.

2. Continuing Education
A mediator has a responsibility to participate in continuing education and ongoing professional growth. A mediator is encouraged to join with other mediators and members of related professions to promote professional development.

VIII. Advancement of Mediation

1. Mediation Service
A mediator is encouraged to provide some mediation service in the community for a nominal or no fee and to act as a mentor for others who are entering the profession.

2. Promotion of Mediation
A mediator has a duty to promote the advancement of mediation by encouraging and participating in research, publishing or other forms of professional and/or public information and education.

PARTICIPATING ORGANIZATIONS

American Arbitration Association
140 West 51st Street
New York, NY 10020-1203
Telephone: (212) 484-4000
Fax:(212) 307-4387

American Bar Association
Section Of Dispute Resolution
740 Fifteenth Street, N.W.
Washington, D.C. 20005-1009
Telephone: (202) 662-1681
Fax: (202) 662-1032

Society of Professionals
in Dispute Resolution
815 Fifteenth Street, N.W. Suite 530
Washington , D.C. 20005
Telephone: (202) 783-7277
Fax: (202) 783-7281

MODEL STANDARDS OF CONDUCT FOR MEDIATORS

AMERICAN ARBITRATION ASSOCIATION

AMERICAN BAR ASSOCIATION

SOCIETY OF PROFESSIONALS IN DISPUTE RESOLUTION

MODEL STANDARDS OF CONDUCT FOR MEDIATORS

The Model Standards of Conduct for Mediators were prepared from 1992 through 1994 by a joint committee composed of two delegates from the American Arbitration Association, John D. Feerick, Chair, and David Botwinik, two from the American Bar Association, James Alfini and Nancy Rogers, and two from the Society of Professionals in Dispute Resolution, Susan Dearborn and Lemoine Pierce.

The Model Standards have been approved by the American Arbitration Association, the Litigation Section and the Dispute Resolution Section of the American Bar Association, and the Society of Professionals in Dispute Resolution.

Reporters: Bryant Garth and Kimberlee K. Kovach
Staff Project Director: Frederick E. Woods

The views set out in this publication have not been considered by the American Bar Association House of Delegates and do not constitute the policy of the American Bar Association.

ISBN: 1-57073-191-8

Printed 1995

Introductory Note

The initiative for these standards came from three professional groups: the American Arbitration Association, the American Bar Association, and the Society of Professionals in Dispute Resolution.

The purpose of this initiative was to develop a set of standards to serve as a general framework for the practice of mediation. The effort is a step in the development of the field and a tool to assist practitioners in it -- a beginning, not an end. The model standards are intended to apply to all types of mediation. It is recognized, however, that in some cases the application of these standards may be affected by laws or contractual agreements.

Preface

The model standards of conduct for mediators are intended to perform three major functions: to serve as a guide for the conduct of mediators; to inform the mediating parties; and to promote public confidence in mediation as a process for resolving disputes. The standards draw on existing codes of conduct for mediators and take into account issues and problems that have surfaced in mediation practice. They are offered in the hope that they will serve an educational function and provide assistance to individuals, organizations, and institutions involved in mediation.

Mediation is a process in which an impartial third party -- a mediator -- facilitates the resolution of a dispute by promoting voluntary agreement (or "self-determination") by the parties to the dispute. A mediator facilitates communications, promotes understanding, focuses the parties on their interests, and seeks creative problem solving to enable the parties to reach their own agreement. These standards give meaning to this definition of mediation.

I. Self-Determination: A Mediator Shall Recognize that Mediation is Based on the Principle of Self-Determination by the Parties.

Self-determination is the fundamental principle of mediation. It requires that the mediation process rely upon the ability of the parties to reach a voluntary, uncoerced agreement. Any party may withdraw from mediation at any time.

COMMENTS:

- The mediator may provide information about the process, raise issues, and help parties explore options. The primary role of the mediator is to facilitate a voluntary resolution of a dispute. Parties shall be given the opportunity to consider all proposed options.

- A mediator cannot personally ensure that each party has made a fully informed choice to reach a particular agreement, but it is a good practice for the mediator to make the parties aware of the importance of consulting other professionals, where appropriate, to help them make informed decisions.

II. Impartiality: A Mediator Shall Conduct the Mediation in an Impartial Manner.

The concept of mediator impartiality is central to the mediation process. A mediator shall mediate only those matters in which she or he can remain impartial and evenhanded. If at any time the mediator is unable to conduct the process in an impartial manner, the mediator is obligated to withdraw.

COMMENTS:

- A mediator shall avoid conduct that gives the appearance of partiality toward one of the parties. The quality of the mediation process is enhanced when the parties have confidence in the impartiality of the mediator.

- When mediators are appointed by a court or institution, the appointing agency shall make reasonable efforts to ensure that mediators serve impartially.

- A mediator should guard against partiality or prejudice based on the parties' personal characteristics, background or performance at the mediation.

III. Conflicts of Interest: A Mediator Shall Disclose all Actual and Potential Conflicts of Interest Reasonably Known to the Mediator. After Disclosure, the Mediator Shall Decline to Mediate unless all Parties Choose to Retain the Mediator. The Need to Protect Against Conflicts of Interest also Governs Conduct that Occurs During and After the Mediation.

A conflict of interest is a dealing or relationship that might create an impression of possible bias. The basic approach to questions of conflict of interest is consistent with the concept of self-determination. The mediator has a responsibility to disclose all actual and potential conflicts that are reasonably known to the mediator and could reasonably be seen as raising a question about impartiality. If all parties agree to mediate after being informed of conflicts, the mediator may proceed with the mediation. If, however, the conflict of interest casts serious doubt on the integrity of the process, the mediator shall decline to proceed.

A mediator must avoid the appearance of conflict of interest both during and after the mediation. Without the consent of all parties, a mediator shall not subsequently establish a professional relationship with one of the parties in a related matter, or in an unrelated matter under circumstances which would raise legitimate questions about the integrity of the mediation process.

COMMENTS:

- A mediator shall avoid conflicts of interest in recommending the services of other professionals. A mediator may make reference to professional referral services or associations which maintain rosters of qualified professionals.

- Potential conflicts of interest may arise between administrators of mediation programs and mediators and there may be strong pressures on the mediator to settle a particular case or cases. The mediator's commitment must be to the parties and the process. Pressure from outside of the mediation process should never influence the mediator to coerce parties to settle.

IV. Competence: A Mediator Shall Mediate Only When the Mediator Has the Necessary Qualifications to Satisfy the Reasonable Expectations of the Parties.

Any person may be selected as a mediator, provided that the parties are satisfied with the mediator's qualifications. Training and experience in mediation, however, are often necessary for effective mediation. A person who offers herself or himself as available to serve as a mediator gives parties and the public the expectation that she or he has the competency to mediate effectively. In court-connected or other forms of mandated mediation, it is essential that mediators assigned to the parties have the requisite training and experience.

COMMENTS:

- Mediators should have information available for the parties regarding their relevant training, education and experience.
- The requirements for appearing on a list of mediators must be made public and available to interested persons.
- When mediators are appointed by a court or institution, the appointing agency shall make reasonable efforts to ensure that each mediator is qualified for the particular mediation.

V. Confidentiality: A Mediator Shall Maintain the Reasonable Expectations of the Parties with Regard to Confidentiality.

The reasonable expectations of the parties with regard to confidentiality shall be met by the mediator. The parties' expectations of confidentiality depend on the circumstances of the mediation and any agreements they may make. The mediator shall not disclose any matter that a party expects to be confidential unless given permission by all parties or unless required by law or other public policy.

COMMENTS:

- The parties may make their own rules with respect to confidentiality, or the accepted practice of an individual mediator or institution may dictate a particular set of expectations. Since the parties' expectations regarding confidentiality are important, the mediator should discuss these expectations with the parties.
- If the mediator holds private sessions with a party, the nature of these sessions with regard to confidentiality should be discussed prior to undertaking such sessions.
- In order to protect the integrity of the mediation, a mediator should avoid communicating information about how the parties acted in the mediation process, the merits of the case, or settlement offers. The mediator may report, if required, whether parties appeared at a scheduled mediation.
- Where the parties have agreed that all or a portion of the information disclosed during a mediation is confidential, the parties' agreement should be respected by the mediator.
- Confidentiality should not be construed to limit or prohibit the effective monitoring, research, or evaluation of mediation programs by responsible persons. Under appropriate circumstances, researchers may be permitted to obtain access to statistical data and, with the permission of the parties, to individual case files, observations of live mediations, and interviews with participants.

VI. Quality of the Process: A Mediator Shall Conduct the Mediation Fairly, Diligently, and in a Manner Consistent with the Principle of Self-Determination by the Parties.

A mediator shall work to ensure a quality process and to encourage mutual respect among the parties. A quality process requires a commitment by the mediator to diligence and procedural fairness. There should be adequate opportunity for each party in the mediation to participate in the discussions. The parties decide when and under what conditions they will reach an agreement or terminate a mediation.

COMMENTS:

- A mediator may agree to mediate only when he or she is prepared to commit the attention essential to an effective mediation.

- Mediators should only accept cases when they can satisfy the reasonable expectations of the parties concerning the timing of the process. A mediator should not allow a mediation to be unduly delayed by the parties or their representatives

- The presence or absence of persons at a mediation depends on the agreement of the parties and mediator. The parties and mediator may agree that others may be excluded from particular sessions or from the entire mediation process.

- The primary purpose of a mediator is to facilitate the parties' voluntary agreement. This role differs substantially from other professional-client relationships. Mixing the role of a mediator and the role of a professional advising a client is problematic, and mediators must strive to distinguish between the roles. A mediator should, therefore, refrain from providing professional advice. Where appropriate, a mediator should recommend that parties seek outside professional advice, or consider resolving their dispute through arbitration, counseling, neutral evaluation, or other processes. A mediator who undertakes, at the request of the parties, an additional dispute resolution role in the same matter assumes increased responsibilities and obligations that may be governed by the standards of other professions.

- A mediator shall withdraw from a mediation when incapable of serving or when unable to remain impartial.

- A mediator shall withdraw from a mediation or postpone a session if the mediation is being used to further illegal conduct, or if a party is unable to participate due to drug, alcohol, or other physical or mental incapacity.

- Mediators should not permit their behavior in the mediation process to be guided by a desire for a high settlement rate

VII. Advertising and Solicitation: A Mediator Shall Be Truthful in Advertising and Solicitation for Mediation.

Advertising or any other communication with the public concerning services offered or regarding the education, training, and expertise of the mediator shall be truthful. Mediators shall refrain from promises and guarantees of results.

COMMENTS:

- It is imperative that communication with the public educate and instill confidence in the process.

- In an advertisement or other communication to the public, a mediator may make reference to meeting state, national, or private organization qualifications only if the entity referred to has a procedure for qualifying mediators and the mediator has been duly granted the requisite status.

VIII. Fees: A Mediator Shall Fully Disclose and Explain the Basis of Compensation, Fees, and Charges to the Parties.

The parties should be provided sufficient information about fees at the outset of a mediation to determine if they wish to retain the services of a mediator. If a mediator charges fees, the fees shall be reasonable, considering, among other things, the mediation service, the type and complexity of the matter, the expertise of the mediator, the time required, and the rates customary in the community. The better practice in reaching an understanding about fees is to set down the arrangements in a written agreement

COMMENTS:

- A mediator who withdraws from a mediation should return any unearned fee to the parties.

- A mediator should not enter into a fee agreement which is contingent upon the result of the mediation or amount of the settlement.

- Co-mediators who share a fee should hold to standards of reasonableness in determining the allocation of fees.

- A mediator should not accept a fee for referral of a matter to another mediator or to any other person.

IX. Obligations to the Mediation Process: Mediators Have a Duty to Improve the Practice of Mediation.

COMMENT:

- Mediators are regarded as knowledgeable in the process of mediation. They have an obligation to use their knowledge to help educate the public about mediation; to make mediation accessible to those who would like to use it; to correct abuses; and to improve their professional skills and abilities.

Copies of the Model Standards of Conduct for Mediators are available from the offices of the participating organizations. The addresses are listed on the back cover.

We wish to express our appreciation for a grant from the Harry De Jur Foundation.

O. Core Curriculum

Section O. Core Curriculum for ADR training

Core Curriculum for ADR training

These core curriculum are recommended for Bureau of Land Management (BLM) alternative dispute resolution (ADR) training programs that are outlined in Appendix B, Strategic Plan for Implementing ADR processes in BLM's Public Land Management activities. The subjects listed for each training program are those that the Natural Resource ADR Initiative Team believe to be the minimum need to adequately educate BLM employees about ADR processes and how they can be used in BLM's management of the Public Lands. Program guidance contained in the Strategic Plan is repeated for the readers convenience.

The intent of the Natural Resource ADR Initiative Team was to provide a list of core subjects that could be given by a BLM manager to a private sector trainer, BLM's National Training Center, or their own training staff to develop office-specific ADR training tailored to the current levels of knowledge and anticipated use of ADR for a specific office or situation.

Orientation Program:

Purpose:	To provide all employees with a basic understanding of ADR processes and their application in Public-Land management.
Target audience:	Employees in all BLM offices. This component also can be integrated into National Training Center courses.
Time required:	1 to 1 ½ hours
When:	To be completed within one year of the approval of the Natural Resource ADR Strategic plan.
Instructor:	Local ADR consultant or other knowledgeable person designated by the manager. The Bureau Natural Resource ADR program leader is available to make this presentation if so desired. The team recommends a video program be developed to assist in the necessary ongoing maintenance of the orientation information.

Core Curriculum

A basic discussion of why ADR can work, particularly in complex public land management disputes.

BLM's policy and vision for ADR, and authority to use ADR processes in public land management.

Basic definitions of key ADR processes such as negotiation, facilitation, mediation, arbitration,

fact finding, summary jury trials, mini-trials, and the related concept of an ombudsman.

A discussion of the Dispute Prevention / Dispute Resolution continuum as explained in the chart at the end of this section.. Particular attention should be paid to employee comments such as "we are already doing negotiation / facilitation, what is new about the ADR Initiative."

The relationship to other ADR programs such as the EEO mediation program and mediation or arbitration programs associated with procurement and contracting activities.

User Overview Program

Purpose:	To define ADR processes and concepts. When to use ADR, how the use of ADR can enhance agency management decisionmaking, how to contact in-house resources and external (private sector / university) neutrals, how to procure and use ADR providers from the private sector and other agencies, and the role of managers in implementing ADR programs.
Target audience:	State directors, assistant directors, center directors, district managers, area managers, key staff, and invited external group representatives. This component also can integrated into National Training Center courses.
Time Required:	1-2 days
When:	Complete within eighteen months after the Natural Resource ADR Initiative Strategic plan is approved.
Instructor:	Recommend using private sector trainers, particularly if external representatives are invited to attend the training, using the core curriculum developed by the ADR Team.

Core Curriculum

A discussion of BLM's authority to use ADR in public land management. The 1996 Administrative Dispute Resolution Act, The Federal Land Policy and Management Act, The National Environmental Policy Act, the Department of the Interior ADR Plan, and general management authority.

A discussion of why ADR works, particularly in complex public-land management disputes. Provide examples of successful ADR events and unsuccessful ADR processes in BLM and other natural resource agencies, including state, local and private groups, stating why they worked or didn't work. Discuss when a particular ADR process may be useful and appropriate.

Discuss how ADR processes are applicable and who controls use of the processes at the pre-

administrative appeal and litigation phases in a dispute; and how control, formality, and timing shift as disputes escalate up the dispute-resolution chain.

Definition of key ADR processes such as negotiation, facilitation, mediation, arbitration, fact finding, summary jury trials, mini-trials, and the related concept of an ombudsman and how each may be applicable to public land management.

A discussion of the Dispute Prevention / Dispute Resolution continuum as explained in the chart at the end of this section. Particular attention should be paid to employee comments such as we are already doing negotiation / facilitation, what is new about the ADR Initiative?

The relationship to other ADR programs such as the EEO mediation program and mediation or arbitration programs associated with procurement and contracting activities.

A discussion of sources for ADR neutrals, private and public, and how to obtain their services. Address the value of the concept of neutrality and how to achieve it. The benefit and reason why neutral parties should be used in assessments and in conducting ADR events.

How to use ADR professionals to assist agency managers to assess conflict or potential conflicts to determine if and when an ADR process may be appropriate.

Relationship to collaborative decisionmaking concepts, community partnerships, and how consensus building uses ADR processes such as facilitation.

ADR Technical Program:

Purpose:	To provide in-depth, ongoing (maintenance) training. Provide detailed instruction about ADR processes that are most applicable to BLM, how to convene and conduct ADR events, and how to obtain neutrals.
Target audience:	Newly appointed Bureau ADR consultants, other key staff, and external group representatives, and BLM units and their external constituencies that are proposing to use ADR processes for a specific situation.
Time required:	4-5 days
When:	An annual offering supported by the National Training Center (NTC), preferably via satellite methodologies, and in local offices for BLM units that need in-depth training before initiating a specific ADR event.
Instructor:	Recommend private sector trainer using core curriculum developed by the ADR team, as modified based on local conditions. Internal instructors or a combination of private and internal trainers maybe appropriate for NTC long-term maintenance courses.

Initial ADR Consultant Technical Program

Purpose:	To provide detailed instruction on the ADR processes that are most applicable to BLM. BLM policy and vision for ADR, how to convene and conduct ADR events, how to obtain neutrals, the role managers and staff in using ADR processes, the benefits to BLM managers by using ADR processes, and how to market ADR processes to BLM management and external organizations.
Target audience:	Designated Bureau ADR consultants, other key staff, and external group representatives.
Time required:	4-5 days
When:	Complete within 120 days after Natural Resource ADR Strategic Plan has been approved.
Instructor:	Bureau Natural Resource ADR Program Leader assisted by BLM employees and private sector/university sources.

Core Curriculum

A discussion of BLM's authority to use ADR in public land management. The 1996 Administrative Dispute Resolution Act, The Federal Land Policy and Management Act, The National Environmental Policy Act, and general management authority.

An in-depth discussion/role play of why ADR works, particularly in complex public-land management disputes.

Definition of key ADR processes such as negotiation, facilitation, mediation, arbitration, fact finding, summary jury trials, mini-trials, and the related concept of an ombudsman and how each may be applicable to public land management.

A discussion of the Dispute Prevention / Dispute Resolution continuum as explained in the chart at the end of this section. Particular attention should be paid to responses such as we are already doing negotiation / facilitation, what is new about the ADR Initiative?

Discuss how ADR processes are applicable and who controls use of the processes at the pre-administrative appeal and litigation phases in a dispute and how control, formality, and timing shift as disputes escalate up the dispute-resolution chain.

How to address employee/manager comments such as "we are already doing ADR citing negotiation and use of facilitators in day-to-day business and in land use planning public involvement processes.

A detailed discussion of the relationship of the Federal Advisory Committee Act to ADR processes

The relationship to other ADR programs such as the EEO mediation program and mediation or arbitration programs associated with procurement and contracting activities in the Bureau of Land Management.

Examples of successful and unsuccessful ADR processes in BLM and other natural resource agencies, including state, local and private groups, and why they worked or didn't work.

A discussion of sources for ADR neutrals, private and public, how to obtain their services, address the value of the concept of neutrality and how to achieve it.

How to use ADR professionals to assist BLM managers to assess conflict or potential conflicts to determine if and when an ADR process may appropriate.

Relationship to collaborative decisionmaking concepts, community partnerships, and how consensus building uses ADR processes such as facilitation.

Discuss/demonstrate the stages of a facilitated and mediated ADR event, beginning with convening, to opening a session, then on to the conclusion of an ADR session.

ALTERNATIVE DISPUTE RESOLUTION
The Dispute Prevention/Dispute Resolution Continuum

	Dispute Prevention		Dispute Resolution
Activity	Our day-to-day business	Collaborative Projects	Protests, appeals, court cases
Process	Negotiation, facilitation	Negotiation, facilitation	Negotiation, facilitation, mediation, arbitration, summary jury trials, mini trials, med-arb, settlements, factfinding, special masters
Applied to:	Negotiations between field employees, office staff, and managers with customers often occur regarding operational issues and facilitation of public meetings under NEPA are examples.	Collaborative decisionmaking in land use planning; Community partnerships; Consensus building projects.	Resolution of arguments, complaints, protests, appeals, and court cases.
Control features	BLM and customers control how, when, and what the outcomes will be.	BLM and customers control their participation in projects. Once a decision is made to participate or to continue to participate, the group process may control outcomes, except BLM managers have to follow the law and can negate outcomes if they are contrary to bureau policy or law.	BLM and customers control use in early stages such as protests, control shifts to solicitors, attorneys, and judges as cases enter administrative appeals and judicial systems. BLM and clients can however recommend or push for use of ADR for cases on appeal or in court.
Linkage	All phases are interlinked. All phases use some common procedures, mostly negotiation and facilitation, I. e. BLM and clients who negotiate in the field over operational issues may be characterized as involved in informal, but critical, dispute resolution that prevents escalation of a dispute to formal administrative appeals or court systems.		

Generic Position Description

and

Position Description Amendment

for

Office Alternative Dispute Resolution Consultants

The attached position description is included as a sample of a position description and a position description amendment for collateral duty assignments that can be used for employees who are designated as their office's Alternative Dispute Resolution Consultant.

INTRODUCTION

The incumbent serves as an Alternative Dispute Resolution (ADR) Consultant. The ADR Consultant is responsible to the _____ Management Team to provide information and education about ADR and convening ADR processes for natural-resource, public-land management issues.

MAJOR DUTIES

Provides consultation services to managers and staff in the use of ADR processes.

Promotes use of ADR in natural resource, public land management in the States/Directorates/Centers.

Assists the_____ in the accomplishment of the Bureau's strategy for using collaborative decisionmaking processes in the management of natural resources.

Analyzes and develops policies and procedures for setting up ADR processes into program activities and for management decisions.

Assesses new and emerging issues and integrates ADR processes into the establishment of management goals and priorities.

Develops, analyzes, and recommends use of ADR processes during the development of policies relating to resource issues, priorities, and operations. Works closely with ecosystem teams and field organizations, solving implementation problems as they arise.

Communicates and coordinates information both internally and externally.

FACTORS

Factor 1 - Knowledge Required by the Position

Sound knowledge of ADR processes, how to convene an ADR process, and Bureau policies on the use of ADR and collaborative decisionmaking processes are required to advise the _____ Director, and other management and staff personnel on strategies for implementing, integrating and using collaborative, dispute prevention, and dispute resolution techniques and processes in the _____.

A working knowledge of established methods and techniques of natural resource management and land-use planning policies, procedures, and regulatory requirements along with a working knowledge of Federal agency policies, procedures, and applicable statutes to facilitate accomplishment of the Bureau's strategy for using collaborative decisionmaking processes in natural resource management.

The skill to negotiate effectively with management officials and resource specialists to accept and implement program recommendations when proposals involve agency resources, changes in established procedures, or conflict with current policies.

Ability to conduct a situation assessment and hence provide recommendations on which ADR process may be appropriate and how to convene an ADR process.

Ability to communicate effectively orally and in writing.

Factor 2 - Supervisory Controls

As a member of the _____ the employee works under the direction of the _____. ADR program implementation is closely monitored by the supervisor. The supervisor specifies the immediate objectives, scope of the assignment, and deadlines to be met. The employee is expected to work closely with the supervisor and the other members of the statewide _____ Team to implement program guidance issued from Bureau Headquarters and discuss issues and approaches to resolving controversial matters. Completed work is reviewed for technical soundness and accomplishment of specified objectives. Although methods used are not usually reviewed in detail, controversial findings or recommendations are reviewed for effects on other organizational programs.

Factor 3 - Guidelines

Guidelines for ADR Program implementation include public laws, academic literature, and information provided by Bureau Headquarters. The employee uses judgment and discretion in determining which guidelines apply to specific situations. In cases when guidelines lack specificity, the incumbent determines the course of action based on review of several sources of guidelines and recommends development or changes to existing guidelines.

Factor 4 - Complexity

Perform tasks that help in making new and significant changes to basic ways in which the managers and employees at all levels in the _____ involve the public in its decision making activities in natural resource management. Assignments can be carried out without substantial changes or modifications to precedents.

Factor 5 - Scope and Effect

The purpose of the work is to accomplish conventional tasks in support of program development and achievement in the emerging field of ADR. The work will primarily affect land-use planning, and other natural resource management activities. The work is expected to result in significant changes in how the _____ manages public participation into land-use planning activities and manages all other types of conflict and disputes within the Bureau.

Factor 6 - Personal Contacts

Contacts include senior employees in the _____ organization, the Bureau Dispute Resolution Specialist, ADR specialists in other bureaus, the private sector, and ADR practitioners.

Factor 7 - Purpose of Contacts

The purpose of the contacts is to provide advice and recommendations to the _____ Team, inform people about collaborative dispute prevention and resolution processes; to develop, propose, and explain strategies for using collaborative dispute prevention and resolution processes; and share information about the use of these processes.

Factor 8 - Physical Demands

There is a normal amount of physical activity typical of office positions, including occasional visits to work sites.

Factor 9 - Work Environment

Work is normally performed in an office setting.

Alternative Dispute Resolution (ADR) Consultant

AMENDMENT to Position Description No._____, (Title)

Additional Duties:

Provides assistance to the _____ in the use of alternative dispute resolution (ADR) processes.

Promotes using ADR and collaborative decisionmaking in natural resources management activities throughout the _____.

Assists the _____ in the accomplishment of the Bureau's strategy for using ADR, including collaborative decisionmaking, processes in the management of natural resources.

Analyzes and develops policies and procedures for setting up ADR processes, including collaborative decisionmaking, in program activities and management decisions.

Assesses new and emerging issues and integrates ADR processes into the establishment of management goals and priorities.

Develops, analyzes, and recommends use of ADR processes during the development of policies relating to resource issues, priorities, and operations. Works closely with ecosystem teams and field organizations, solving implementation problems as they arise.

Communicates and coordinates information both internally and externally.

Additional Knowledge Required by the Position

Sound knowledge of ADR processes, how to convene an ADR process, and Bureau policies on the use of ADR and collaborative decisionmaking processes are required to advise the _____ Director, and other management and staff personnel on strategies for implementing, integrating, and using collaborative, dispute prevention, and dispute resolution techniques and processes in the _____.

A professional knowledge of established methods and techniques of natural resource management and land-use planning policies, procedures, and regulatory requirements along with a working knowledge of Federal agency policies, procedures, and applicable statutes to facilitate accomplishment of the Bureau's strategy for using ADR in natural resources' management.

The skill to negotiate effectively with management officials and resource specialists to accept and implement program recommendations when proposals involve agency

resources, changes in established procedures, or conflict with current practices.

Ability to conduct a situation assessment and hence provide recommendations on which ADR process may be appropriate and how to convene an ADR process.

Ability to communicate effectively orally and in writing.

Added Guidelines

Guidelines for ADR Program implementation include public laws, academic literature, and information provided by Bureau Headquarters. The employee uses judgment and discretion in determining which guidelines apply to specific situations. In cases when guidelines lack specificity, the incumbent determines the course of action based on review of several sources of guidelines and recommends development or changes to existing guidelines.

Additional Complexity

Performs tasks that help in making new and significant changes to basic ways in which the managers and employees at all levels in the state involve the public in its decisionmaking activities in natural resource management. Assignments can be carried out without substantial changes or modifications to precedents.

Additional Scope and Effect

The purpose of the work is to accomplish conventional tasks in support of program development and achievement for the ecosystem in the emerging field of ADR. The work will primarily affect land-use planning, and other natural resources' management activities. The work is expected to result in significant changes in how the ecosystem manages public participation into land-use planning activities and manages all other types of conflict and disputes within the Bureau.

Additional Personal Contacts

Contacts include senior employees in the state organization, the Bureau Dispute Resolution Specialist, ADR specialists in other bureaus, the private sector, and ADR practitioners.

All other aspects of the position remain identical to the existing position description.

Case Studies

Examples of past ADR events

These case studies are presented for the purpose of providing managers with exampes where ADR has been used in the BLM and similar agencies such as the Forest Service. BLM employees are encouraged to submit case studies in the same format as they become involved in ADR events, as either a convener, participant or observer. Case studies of both successful and unsuccessful ADR events are needed to provide BLM managers and staff with examples of do's and don'ts and points of contact they can consult with.

Place: Kingman Field Office, Arizona

Contact and phone number: Scott Elefritz (520) 757-3161

Period covering the situation: 1993-1996

Parties involved: BLM, National Park Service, Arizona Bighorn Sheep Society, International Society for the Protection of Mustangs and Burros, Mohave Sportsman Club, Arizona Game and Fish and Sierra Club.

Type(s) of ADR: Negotiation and Facilitated Discussions

Nature of the issues: The BLM developed a management plan for the 840,000 acre Black Mountain Ecosystem in response to long-standing resource use conflicts and management controversies, especially regarding desert bighorn sheep, wild burros and livestock.

Outcome: The BLM, National Park Service and Arizona Game and Fish developed a management plan that addressed the resource issues in the Ecosystem.

Abstract: The most prevalent issue in the management of the ecosystem pertains to competition between wild burros, desert bighorn sheep, mule deer and livestock. The issue came to a head in 1990 when 54 burros were killed by persons unknown. The Bureau and other interests began looking for a way to solve the complex issues found in the Black Mountains. In 1993, The Black Mountain Ecosystem Management Team was formed to help meet the challenge. The team met monthly for two and one half years to develop the management strategy. The result of this partnership was the development of and implementation of an ecosystem plan which was completed in April, 1996. The plan addresses not only the animal issue above, but includes management direction for wilderness, recreation, biodiversity, habitat continuity and sustainability and cultural resources. The success of the effort was due to the parties ability and willingness to place the health of the ecosystem over individual interests. In doing so, they found their interests were served as well.

TROUT CREEK WORKING GROUP

Place: Whitehorse Butte Allotment, Jordan Resource Area, Vale District

Contact and phone number: Thomas G. Forre, (541)-473 6284

Period covering the situation: 1989 to present (January, 1997)

Parties involved: BLM, Trout Creek Working Group, Oregon Department of Fish and Wildlife, U.S. Fish and Wildlife, Livestock permittees and landowners.

Type(s) of ADR: Facilitated discussions and negotiated development of an allotment management plan to resolve resource issues

Nature of the issue(s) or dispute: Resolve resource issues involving riparian management, fishery habitat, and watershed management.

Outcome: An Allotment Management Plan (AMP) was developed and implemented for the Whitehorse Butte allotment in 1991.

Abstract: The Trout Creek Working Group was formed in 1988 to assist the BLM in making significant management changes on the Whitehorse Butte allotment. The formation of the working group was to create management solutions by bringing together an array of different interests to build trust, allow for a means of open communication, and to develop a common goal. Throughout the process, the BLM was working on solutions to declining riparian conditions, poor fishery habitat and degraded watershed conditions.

As BLM resource solutions were designed, those solutions were presented to the working group to determine if resource objectives would be met and how the changes would affect resource users and interested publics. The working group was a forum used to bring forth discussion about conflicting uses and ideals, to understand what was possible, and to develop clear goals.

The success of the project by using Alternative Dispute Resolution (ADR) was that those individuals participating were given an opportunity to openly present their views and concerns enabling other working group members to understand those concerns. The process is lengthy and time consuming, but thorough open discussion allowed better activity plans to be developed.

Place: Cape Cod, Massachusetts

Contact and phone number: Linda Canzanelli, (508)-349-3785 ext. 202

Period covering the situation: 1985-96

Parties involved: National Park Service, Congress, Massachusetts Division of Fisheries and Wildlife, and environmental, recreation, and other interested groups. A total of 23 parties were involved.

Type(s) of ADR: Negotiated Rulemaking

Nature of the issues: Development of off-road vehicle (ORV) regulations in an attempt to balance the recreational and habitation uses of the Cape Cod shores.

Outcome: All parties are satisfied with the agreement towards proposing rules that would meet the needs of ORV recreationists and other uses of the area.

Abstract: The Cape Cod area has been used for the last 20 years for ORV recreation, fishing, and is a habitat for the endangered piping plover. The original regulations, passed in 1985, gave ORV users limited access to the dunes and beaches to protect the area's natural resources. Soon after the ORV regs were passed, the piping plover was listed as endangered. Environmental groups have been legally challenging the Park Service's regulations since 1988. By 1993, the Park Service and the State of Massachusetts agreed to retain a dispute resolution consultant. Approval had to be obtained from the Secretary to start the negotiations and avoid violating the Federal Advisory Committee Act. The first session was held in 1995 to agree on the ground rules for the resolution process, a critical issue since this was the first time many of the parties had ever collaborated face-to-face. The second session was to work out the details and limitations of the rules. The third session, held November 1995, was purposely not attended by the Park Service and is the point where the final agreements were made regarding the maximum annual number of ORV permits, nighttime fishing, and the Park Service's responsibility for changing the vehicle corridors according to the plover's nesting patterns. Most parties left the last session content and supportive of the negotiated rulemaking process. The Park Service is planning to issue the proposed regulations in November 1996.

Place: Salida, Colorado

Contact and phone number: Sue Ballenski, Forest Service, (303)275-5373

Period covering the situation: 1988-1996

Parties involved: USDA Forest Service, Public Service of Colorado, Trout Unlimited, Colorado State Division of Wildlife, US Fish and Wildlife

Type(s) of ADR: Mediation

Nature of the issues: Disagreement as to by-pass flows in the Los Animas River which was depleting power from a hydro-electric power plant and harming fish habitat in the river.

Outcome: Agreement reached, awaiting final signature of Forest Service officials.

Abstract: How to balance competing interests of a private sector utility company, the public, the Forest Service (other governmental agencies), and an environmental group relating to fish habitat in the Los Animas River. The various parties mentioned above had been arguing for the past eight years about how much by-pass flow of water would be allowed in the river. There had been several meetings throughout the years, but nothing was ever resolved and tension was high among the parties. The Forest Service contacted a BLM employee that had experience in natural resource ADR techniques, and was referred by them to a private mediation group doing business out of Boulder, Colorado. This firm had extensive experience in mediating natural resource disputes, and as it turned out had an employee well versed specifically in hydro-electric power issues. A meeting was convened in late Spring of this year to bring all parties to the table to see if the issue of which by-pass flow model plan was to be adapted to the area could be resolved. The meeting was scheduled for two days at the Forest Services offices in Denver, Colorado. At the end of the session all parties had agreed to adopt a modified Forest Service plan which would allow for gradual flow increases over a period of time. As of this date the agreement is pending final signature from the Forest Service

Place: Bureau wide

Contact and phone number: Ted Hudson, (202)-452-5042 and Carl Barna (202)-452-0325

Period covering the situation: 1988-1992

Parties involved: BLM, State of Wyoming, USGS, amateur collecting clubs, two commercial fossil collectors, the Paleontological Society, and academic collectors.

Type(s) of ADR: Negotiated Rulemaking

Nature of the issues: Developing regulations for the collection of fossils. Also known as the "Paleo Rule."

Outcome: The proposed rule did not have the support of the Director and was never published for public comment.

Abstract: The principal issue of contention was how to balance the interests of commercial and amateur fossil collectors and the interests of the academic community. A third party contractor was hired to facilitate a meeting between BLM and key publics affected by BLM's requirements for collecting fossils from public lands. The sessions were held in Wyoming. The contractor arranged the first meeting and determined which parties needed to be present. The second meeting was facilitated by a BLM employee, which may not have been perceived as favorable to creating a neutral and open discussion. A "grudging" consensus was made on the various rules. Though the process could have been implemented better, the two meetings allowed BLM to draft proposed regulations that reflected the collaboration between key publics and our specialists. However, under political pressure from one of the state governments involved in the negotiation, the Director declined to allow publication of the proposed rule.

Place: Bureau wide

Contact and phone number: Ted Hudson, (202)-452-5042 and Vanessa Engle, (202)-452-7776

Period covering the situation: 1992-1996

Parties involved: BLM, Warner Brothers and other film industry representatives, the Sierra Club, the Wilderness Society, the Southern Utah Wilderness Alliance (and other environmental groups), the National Park Service, the U.S. Forest Service, and the Film Commission of California and Utah.

Type(s) of ADR: Informal meeting to try to resolve one issue involving leases, permits, and easements regulations.

Nature of the issues: Develop regulations for issuing film permits

Outcome: Agreements made during the facilitated sessions were not supported by others in the film industry or by some of the participants. Regulations eventually passed a few years later.

Abstract: The issue of whether a film (or any other) permit could be put in effect pending the outcome of an administrative appeal which arose after a proposed rule revising BLM's regulations on lease and permits was published in 1990. A Washington, D.C.-based third party contractor (RESOLVE, Inc.) was hired to facilitate a September 1993 session between BLM and a few key constituents to resolve the issues. The session was held in California. The session seemed to go well and the group agreed to regulations to determine under what circumstances a permit issuance could be placed in immediate effect. The proposed rules issued in February 1995, however, had intense opposition from the film industry, including some of the participants in the California meeting. The objections had not been anticipated. BLM went on to use the information gained from the experience to revise the rules and issue final rules in June 1996. To solve the immediate political problem, BLM issued a stopgap partial final rule to make all minimum impact permits, as that term is interpreted in the present regulations, to be effective pending appeal. BLM ultimately will re-propose the entire set of regulations dealing with leases, permits, and easements.

Place: Salmon, District Office, Salmon, Idaho

Contact and phone number: John Schumaker, Natural ADR Program Leader (formerly of Idaho State Office) (719) 481-4728

Period covering the situation: Early 90's.

Parties involved: BLM and U.S. Forest Service employees in a joint BLM/FS fire dispatch office. Private sector mediator

Type(s) of ADR: Mediation

Nature of the issues: The BLM and FS had formed a joint fire dispatch office in the BLM fire center in Salmon, Idaho in the previous two years. Major problems erupted between employees on a number of issues which threatened the joint venture.

Outcome: The Idaho State Director, Del Vail, now retired, decided to send private sector mediator from Boise, Idaho to resolve the conflict. The neutral spent one day in Salmon and at the end of the day all employees agreed to a plan of action and interpersonal conduct which resolved the conflict.

Abstract: The neutral, an experienced mediator from Boise, was hired based on a recommendation to the Idaho State Director by the contact person cited above. The mediator was hired as a temporary GS 12 using the 30 day emergency hiring authority and was paid per diem and travel for three days. The total cost for the neutral was about $700.00. A small sum to restore order to a very contentious situation between two agencies. Post mediation questioning indicated that the employees appreciated the end of conflict. Their appraisal of the mediation process was typical. Many stated that the first three quarters of the day was wasted on talking, but real progress was made in the last hour. This is typical of a dispute resolution process. People have to vent and discuss their issues and concerns, and resolution often happens in very quick order once the venting and discussion process has been completed.

Place: Wyoming State Office

Contact and phone number: Ray Wilson - 307-775-6009

Period covering the situation: 1995

Parties involved: Supervisor/Employee

Type of ADR: Mediation

Nature of the issues: EEO Complaint involving communication and supervision issues.

Outcome: The two parties reached a written agreement.

Abstract: The costs were only the lost work time as we used a local mediator from another federal agency that we have a partnership with. The benefits were that it prevented us from bringing in an EEO Counselor who would have been more expensive and also would have involved many other employees than the two disputants which would have created additional workplace conflicts. Had this complaint not been resolved and went through the entire EEO administrative complaints process, it could have cost the agency up to $80,000 in administrative costs alone (work months, travel costs, court reporters, hearings, etc.) .

This process was used because both parties were willing to talk about the issues and make concessions to each other to resolve the issues and make a written agreement. The major lesson we learned was that both parties must be willing to do the follow-up needed to complete the agreed upon actions. In this case, the employee perceived that one of the terms agreed to in writing was not done and eventually filed another complaint based in part, on the action that was not accomplished.

Despite the fact that another complaint was filed, all but one of the original issues were resolved during the mediation for the first complaint and both parties would be willing to use ADR processes again.

Section R. Questions to Ask Potential ADR Practitioners

Questions to ask a potential third-party neutral or trainer

This section lists some questions you may want to ask potential ADR practitioners and trainers about their qualifications, attitudes, means of conducting an ADR process, and other general administrative questions. Each ADR process has its own set of procedures and flexibility, hence your questions will need to be modified to fit the particular process.

Questions:

What is your background in alternative dispute resolution, collaborative decisonmaking, dispute prevention, and dispute resolution?

The general topic at issue is_____. What knowledge or experience do you have with the topic that is in dispute?

How would you conduct or recommend that a mediation event be conducted? 1) Principles to dispute meet face to face at all times. 2) Principles meet face to face in initial phases, then use caucuses as needed. 3) Principles meet in separate rooms with the mediator shuttling between the rooms. 4) Attorneys represent principles in style 1) or 2) or 3) above. (Refer to Section L of this tool kit for a discussion of how a mediation may be conducted.)

What style of mediation do you use? [Evaluative_____, or Transformational____] [Rights based____, Interest based _____, or Therapeutic ____] Refer to Section L of this tool kit for description of these styles of mediation.

For mediation, how do you see your role?

What role do you see for attorneys in this case? Should attorneys be present during the negotiations?

How would you facilitate the size of the group anticipated for this case(_____ number of participants at ____ number of locations) ?

How do you charge for your time? By the hour_____the day_____.the case_____

Are you aware of the particular dispute and do you see any potential conflict of interest for yourself?

Do you belong to a professional organization that has standards for ethics and conduct? What is the organization.

Can you provide references based on past work similar to work we are anticipating.

Section S. Sample Protocol Agreements to use in ADR

Sample ADR Agreements

Attached are sample agreements for mediation, mini-trials, factfinding, arbitration, and financial cost sharing. These agreements were adapted from the booklet "Guidance on the Use of Alternative Dispute Resolution for Litigation in the Federal Courts" published by the Civil Division, Department of Justice, Washington, D.C., August 1992. These sample agreements are intended as guides and BLM managers should contact their solicitor for assistance in developing specific agreements.

MEDIATION PROTOCOL AGREEMENT BETWEEN
THE UNITED STATES OF AMERICA
AND
_____

This Mediation Protocol Agreement (the "Protocol Agreement"), dated this _____ day of _____ __19_____, is executed by NAME ,TITLE, on behalf of the United States of America (the "United States"), and by NAME _____ on behalf of the other parties _____

RECITALS

1.The United States and the parties are currently engaged in a dispute [or are attempting to prevent a dispute] in an administrative program administered by the Bureau of Land Management.

2. The United States and the parties have agreed to seek a resolution of issue through the use of mediation.

3. This Protocol Agreement is intended to set forth the conditions under which the parties will conduct mediation, thereby avoiding future disputes and disagreements.

AGREEMENT

NOW, THEREFORE, subject to the terms and conditions of this Agreement, the parties mutually agree as follows:

1. Participants in the Mediation Process.

A. Interests Represented: Any party to the case may(2)be represented in the mediation process. Parties may group together to represent allied interests.

B. Additional Parties: After the mediation process has begun, additional parties may join the process only with the concurrence of all parties already represented.

C. Representatives: A representative of each party or alternate must attend each full negotiating session. The designated representative may be accompanied by such other individuals as the representative believes are appropriate to represent his/her interest, but only the designated representative will have the privilege of sitting at the negotiating table and of speaking during the negotiations, except that any representative may call upon a technical or legal adviser to elaborate on a relevant point.

2. Mediator. The neutral mediator is _____

ALTERNATIVELY, IF THE MEDIATOR IS NOT DESIGNATED BY THE Agency:

The mediator is to be chosen by the parties in the following manner: Each party, through its representative, will circulate a list of three names to all other parties. The parties will then make every effort to choose a mediator from the combined lists of all the parties. If the parties prove unable to agree on a mediator, then the mediator will be chosen from the combined lists by _____ . [The person designated to choose the mediator may be an official agreeable to all the parties].

3. Negotiating Sessions. Negotiating sessions will be held at a time and place convenient to the parties. The following rules will govern the negotiating sessions:

A. Meeting agendas will be developed by the consensus of the parties. Agendas will be provided before every negotiating session.

B. Any party may call a recess in the negotiating session at any time. The party calling the recess will inform the others of the expected length of the recess.

C. Negotiating sessions shall not be recorded verbatim. Formal minutes of the proceedings shall not be kept.

4. Confidentiality and the Use of Information.

A. The mediation process is confidential. The parties and the mediator agree that they will not disclose information regarding the process, including settlement terms, to third parties, unless the participants otherwise agree in writing or as authorized by law. The mediation process shall be treated as a compromise negotiation for purposes of the Federal Rules of Evidence (Rule 408 and any other applicable rules) and state rules of evidence. The mediator will be disqualified as a witness, consultant or expert in any pending or future action relating to the subject matter of the mediation, including those between persons not parties to the mediation. Failure to meet the confidentiality or press requirements of this Protocol Agreement is a basis for exclusion from the negotiating sessions.

B. The mediator agrees that if he/she discloses information regarding the mediation process, including settlement terms, to third parties without the participants' written agreement, except as ordered by a court with appropriate jurisdiction, he/she agrees to the following as liquidated damages to the parties:

1) Removal from the case;

2) Removal from any Department of Justice list of approved neutrals;

3) Payment of an amount equal to [at a minimum, the amount of the mediator's fee].

THE FOLLOWING PARAGRAPHS MAY BE INSERTED
IF DESIRED BY THE PARTIES.

4) [All parties agree not to withhold relevant information. If a party believes it cannot or should not release such information, it will state that certain information is being withheld and will provide the substance of the information withheld in some form (such as by aggregating data, by deleting non-relevant confidential information, by providing summaries, or by furnishing it to a neutral consultant to use or abstract) or a general description of it, and the reason for not providing it directly. Nothing in this paragraph imposes liability against the United States to disclose information, when such information is not releasable pursuant to statute, regulation, or the reasonable discretion of an appropriate official.]

5) [A party may withhold documents if it reasonably believes them to be privileged. Production of some documents does not constitute a waiver of a privilege applicable to other documents even if the document falls within the same category as the document produced.)

6) [Parties will provide information called for by this paragraph as much in advance of the negotiating sessions as possible. (DEADLINES NEGOTIATED BY THE PARTIES OR SET BY THE NEUTRAL SHOULD BE INCLUDED IN THE AGREEMENT]]

7) [In advance, each party will provide for the mediator a confidential statement, which includes the highlights of the claims and defenses, the status of the case, any pending motions, the nature of the damages, the critical issues in the case, as well as the maximum and minimum amounts each party believes the case is worth.]

5. Press.

[NOTE: THIS PARAGRAPH IS OPTIONAL. ALSO, CONSIDER THE OBLIGATION OF THE UNITED STATES TO ALLOW PUBLIC ACCESS TO CERTAIN INFORMATION.]

A. No party or caucus, or their representative, will discuss any matter relating to the mediation process with the press except by the express written permission of all other parties to the mediation process.

IN THE ALTERNATIVE, SUCH PARAGRAPHS

AS THE FOLLOWING MAY BE USED.

B.A joint press statement shall be agreed to by theparticipants at the conclusion of each negotiating session. A joint concluding statement shall be agreed to by the participants and issued by the mediator at the conclusion of the mediation process. Participants and the mediator shall respond to press inquiries within the spirit of the press statement agreed to at the conclusion of each negotiating session.

C. Participants and the mediator will strictly observe this Protocol Agreement in all contacts with the press and in other public forums. The mediator shall be available to discuss with the press any questions on the process and progress of the negotiations. No specific offers, positions, or statements made during the negotiations by any other party shall be divulged to the press by the mediator or any other party.

6. Approval of Proposals.

A. It is recognized that unqualified acceptance of individual provisions is not possible out of the context of a full and final agreement. However, tentative agreement of individual provisions or portions thereof will be signed by initialing the agreed upon items by the representatives of all interests at the negotiating session. This shall not preclude the parties from considering or revising the agreed upon items by mutual consent.

B. Upon final agreement, all representatives of a party or a caucus shall sign and date the appropriate document. It is explicitly recognized that the representatives of the Department of Justice and/or the United States Attorney may not have the final authority to agree to any terms in this case. Final approval must be obtained from the appropriate officials.

7. Safeguards for the Parties.

A. All participants in the mediation process agree to act in good faith in all aspects of the process. Specific offers, positions, or statements made during the negotiations may not be raised by other parties for any other purpose or as a basis for pending or future litigation. Personal attacks and inflammatory statements are unacceptable.

B. The participants may discontinue the mediation process at any time if they deem the process not productive. The withdrawal of one or more participants does [or does not] end the mediation process as to all other participants. Withdrawing parties remain bound by the provisions in this Protocol Agreement, particularly those regarding public comment and confidentiality.

8. This Protocol Agreement shall be effective upon the signatures of the representatives.

DATED:
BY:
Principal Representative for
the United States

DATED:
BY:
Principal Representative for
XYZ Corp.

DATED: _____
BY: _____
Mediator

MINI-TRIAL PROTOCOL AGREEMENT BETWEEN
UNITED STATES OF AMERICA
AND

_____

This Mini-Trial Protocol Agreement (the "Protocol Agreement"), dated this _____ day of _____ 19 _____ is executed by NAME TITLE , on behalf of the United States of America (the "United States"), and by NAME , on behalf of NAME (XYZ Corp.").

RECITALS

1.The United States and XYZ Corp. are currently engaged in litigation [or are about to engage in litigation] in the United States District Court for _____

2.The United States and XYZ Corp. have agreed to seek a resolution of NAME OF CASE Docket No. _____ through the use of a Mini-Trial.

3.This Protocol Agreement is intended to set forth the conditions under which the parties will conduct the Mini-Trial, thereby avoiding future disputes and disagreements.

AGREEMENT

NOW, THEREFORE, subject to the terms and conditions of this Agreement, the parties mutually agree as follows:

1. The United States and XYZ Corp. will voluntarily engage in a non-binding Mini-Trial on the issue of _____

THE ISSUES MAY BE DELINEATED SPECIFICALLY OR GENERALLY DEPENDING ON THE NATURE OF THE CASE. The Mini-Trialwill be held on _____ _____ 19__, at Time of Day , LOCATION

2.The purpose of this Mini-Trial is to inform the principal participants of the position of each party on the issues in the case and the underlying bases of the parties' positions. It is agreed that each party will have the opportunity and responsibility to present its "best case" on entitlement and quantum.

3.The principal participants for the purpose of this mini-trial will be _____ for the United States and _____ _____ for XYZ Corp. _____. The principal participants have the authority to settle the dispute or to make a recommendation concerning settlement. Each party will present its position to the principal participants through that party's designated representative, _____ __ for the United States, and _____, for XYZ Corp.

4.The parties have agreed that _____ shall serve as a Neutral Advisor to the principals. The Neutral Advisor shall be compensated as set forth in the Financial Agreement. The Advisor has warranted that he or she has had no prior involvement with this dispute or litigation and has agreed that he or she will not participate in the litigation should the Mini-Trial fail to resolve the dispute. The Neutral Advisorshall participate in the Mini-Trial proceedings and shall renderan opinion, upon request, on the following issues: _____

_____

THIS CLAUSE SHOULD BE USED ONLYIF THE PARTIES HAVE AGREED THAT THE PARTICIPATION OF A NEUTRALADVISOR WOULD BE USEFUL

5.All discovery will be completed in twenty working days following the execution of this Protocol Agreement. Neither party shall propound more than 15 interrogatories or requests for admissions, including subparts; nor shall either party take more than five depositions and no deposition shall last more than three hours. Discovery taken during the period prior to the Mini-Trial shall be admissible for all purposes in this litigation to the same extent as any other discovery, including. any subsequent hearing before any court of competent authority in the event this Mini-Trial does not result in a resolution of this matter. It is

agreed that the pursuit of discovery during the period prior to the Mini-Trial shall not restrict either party's ability to take additional discovery at a later date. In particular, it is understood and agreed that partial depositions may be necessary to prepare for the Mini-Trial. If this matter is not resolved informally as a result of this procedure, more complete depositions of the same individuals may be necessary. In that event, the partial depositions taken during this interim period shall in no way foreclose additional depositions of the same individual into the same or additional subject matter for a later hearing.

6.The presentations at the Mini-Trial will be informal. The rules of evidence will not apply, and witnesses may provide testimony in narrative form. The principal participants may ask any questions of the witnesses. However, any questioning by the principals, other than that occurring during the period set aside for questions, shall be charged to the time period allowed for that party's presentation of its case as delineated in Paragraph

7.At the Mini-Trial proceeding, the representatives have the discretion to structure their presentations as desired. The presentation may include the testimony of expert witnesses, the use of audio visual aids, demonstrative evidence, depositions, and oral argument. The parties agree that stipulations will be utilized to the maximum extent possible. Any complete or partial depositions taken in connection with the litigation in general, or in contemplation of the Mini-Trial proceedings, may be introduced at the Mini-Trial as information to assist the principal participants to understand the various aspects of the parties' respective positions. The parties may use any type of written material which will further the progress of the Mini-Trial. The parties may, if desired, no later than ___ weeks prior to commencement of the Mini-Trial, submit to the representatives for the opposing side a position paper of no more than 25 - 8 1/2" X 11" double spaced pages. No later than ___ weeks(s) prior to commencement of the proceedings, the partieswill exchange copies of al.1 documentary evidence proposed for use at the Mini-Trial and a list of all witnesses.

8.The Mini-Trial proceedings shall take one day. The morning's proceedings shall begin at ____ a.m. and shall continue until _____ a.m. The afternoon's proceedings shall begin at_____ p.m. and continue until _____ p.m. A sample schedule follows:

9:00 a.m. - 10:00 a.m.	XYZ Corp-Is position and case presentation.
10:00 a.m. - 11:00 a.m.	United States' cross-examination.
11:00 a.m. - 11:30 a.m.	XYZ Corp.'s rebuttal.
11:30 a.m. - 12:00 noon	Open question and answer period.
12:00 noon - 1:00 p.m.	Lunch
1:00 p.m. - 2:00 p.m.	United States' position and case presentation.
2:00 p.m. - 3:00 p.m.	XYZ Corp.'s cross-examination.
3:00 p.m. - 3:30 p.m.	United States' rebuttal.
3:30 p.m. - 4:00 p.m.	Open question and answer period.
4:00 p.m. - 4:30 p.m.	XYZ Corp.'s closing argument.
4:30 p.m. - 5:00 p.m.	United States' closing argument.

9.Within _____ day(s) following the termination of the Mini-Trial proceedings, the principal participants should meet, or confer, as often as they shall mutually agree might be productive for resolution of the dispute. If the parties are unable to resolve the dispute within ____ days following completion of the Mini-Trial, the Mini-Trial process shall be deemed terminated and the litigation will continue.

10. No transcript or recording shall be made of the Mini-Trial proceedings. Except for discovery undertaken in connection with this Mini-Trial, all written material prepared specifically for utilization at the Mini-Trial, all oral presentations made, and all discussions between or among the parties and/or the Neutral Advisor at the Mini-Trial are confidential to all persons, and are inadmissible as evidence, whether or not for purposes of impeachment, in any pending or future court or administrative action which directly or indirectly involves the parties and the matter in dispute. However, if settlement is reached as aa result of the Mini-Trial, any and all information prepared for, and presented at the proceedings may be used to justify and document the subsequent settlement. Furthermore, evidence that is otherwise admissible shall not be rendered inadmissible as a result of its use at the Mini-Trial.

11. Each party has the right to terminate the Mini-Trial process at any time for any reason whatsoever.

12. Upon execution of this Protocol Agreement, if mutually deemed advisable by the parties, the United States and the XYZ Corp. shall file a joint motion to suspend proceedings in the appropriate court. The motion shall advise the court that the suspension is for the purpose of conducting a Mini-Trial. The court will be advised as to the time schedule established for completing the Mini-Trial proceedings.

DATED: _____
BY: _____
Principal Representative for the United States

DATED: _____
BY: _____
Principal Representative
for XYZ Corn.

DATED: _____
BY: _____
Neutral Advisor

FACTFINDING PROTOCOL AGREEMENT BETWEEN
THE UNITED STATES OF AMERICA
AND

_____

This Factfinding Protocol Agreement (the "Protocol Agreement"), dated this _____ day of _____ _ 19__ executed by NAME , TITLE on behalf of the United States of America (the "United States"), and by NAME , on behalf of NAME ,("XYZ Corp.").

RECITALS

1.The United States and XYZ Corp. are currently engaged in litigation [or are about to engage in litigation] in the United States District Court for ___ _____

2. The United States and XYZ Corp. have agreed to seek a resolution of NAME OF CASE Docket No. _____ through the use of Neutral Factfinding.

3.This Protocol Agreement is intended to set forth the conditions under which the parties will conduct Neutral Factfinding, thereby avoiding future disputes and disagreements.

AGREEMENT

NOW, THEREFORE, subject to the terms and conditions of this Agreement, the parties mutually agree as follows:

1.Participants in the Factfinding Process.

A.Interests Represented: Any party to the case may be represented in the Factfinding process.

(2)

B.Additional Parties: After the Factfinding process has begun, additional parties may join the process only with the concurrence of all parties already represented.

2.Neutral Factfinder. The "Neutral Factfinder" means any person selected in accordance with, and governed by, the provisions of this Agreement.

3.Selection of Neutral Factfinder. The Neutral Factfinder will be chosen by the parties in the following manner:

A.The parties shall exchange with each other lists of three to five potential Neutral Factfinders. Within ten (10) days after the receipt of the lists of potential Neutral Factfinders by the parties, the parties shall numerically rank the listed individual in order of preference and simultaneously exchange such rankings. The individuals with the three (3) lowest combined total scores shall be selected as finalists. Within ten (10) days after such selection, the parties shall arrange to meet with, and interview, the finalists. Within ten (10) days after such meetings, the parties shall rank the finalists in order of preference and exchange rankings. The individual with the lowest combined total score shall be selected as the Neutral Factfinder.

B.If the chosen Neutral Factfinder should refuse to serve, resign, die, withdraw, or be disqualified, unable, or otherwise become incapacitated, the office shall be declared vacant. Vacancies shall be filled in accordance with the applicable provisions of this section, and the dispute shall be re-initiated, unless the parties agree otherwise.

4.Issues to be Resolved Through Factfinding The parties have agreed that the issues to be resolved by the Neutral Factfinder are as follows:' THERE THE ISSUES SHOULD BE STATED AS CONCISELY AS POSSIBLE. IF THE PARTIES CANNOT AGREE ON ONE STATEMENT, THEN EACH PARTY SHOULD SET FORTH ITS FORMULATION OF THE ISSUES TO BE DECIDED BY THE FACTFINDER.

5. Procedure for Factfinding.

A. Within ten (10) days after the selection of the Neutral Factfinder, basic source material shall be jointly submitted to the Neutral Factfinder by the parties. Such basic source material shall consist of:

1) an agreed upon statement of the precise nature of the dispute;

2) the position of each party and the rationale for its position;

3) all information and documents which support each party's position; and

4) [ANY OTHER MATERIAL]

B. Thereafter, for a period of _____ days, the Neutral Factfinder shall conduct an investigation of the issues in dispute. As part of such investigation, the Neutral Factfinder may interview witnesses, request additional documents, request additional information by written questions, and generally use all means at his or her disposal to gather the facts relevant to the disputes as he or she determines. The Neutral Factfinder shall be the sole determiner of the relevancy of information. Conformity to formal rules of evidence shall not be required.

6. Determination of Neutral Factfinder.

A. The Neutral Factfinder shall render a determination within ____ days of beginning the factfinding process, unless:

1) Both parties agree in writing to anextension; or

2) The Neutral Factfinder determines that an extension of the time limit is necessary.

B. The determination of the Neutral Factfinder shall be signed and in writing. It shall contain a full statement of the basis and reasons for the Neutral Factfinder's determination.

C. After the Neutral Factfinder forwards his or her determination to the parties, he or she shall return all dispute specific information provided by the parties (including any copies) and destroy notes concerning this matter.

D. The Determination of the Factfinder shall not be binding upon the parties. No Determination of the Neutral Factfinder shall be admissible as evidence of any issue of fact or law in any other proceeding brought under any other provision of law.

7. Confidentiality and the Use of Information.

A. The Factfinding process is confidential. The parties and the Neutral Factfinder agree that they will not disclose information regarding the process, including settlement terms, to third parties, unless the participants otherwise agree in writing or as authorized by law. The Factfinding process shall be treated as a compromise negotiation for purposes of the Federal Rules of Evidence (Rule 408 and any other applicable rules) and state rules of evidence. The Neutral Factfinder shall be disqualified as a witness, consultant or expert in any pending or future action relating to the subject matter of the Factfinding, including those between persons not parties to the Factfinding. Failure to meet the confidentiality or press requirements of this Protocol Agreement is a basis for exclusion from the Factfinding process. [A party may withhold documents if it reasonably believes them to be privileged. Production of some documents does not constitute a waiver of a privilege applicable to other documents even if the document falls within the same category as the document produced.]

B. The Neutral Factfinder agrees that if he/she discloses

information regarding the Factfinding process, including settlement terms, to third parties without the participants' written agreement, except as ordered by a court with appropriate jurisdiction, he/she agrees to the following as liquidated damages to the parties:

1) Removal from the case;
2) Removal from any Department of Justice list of approved neutrals.
3) payment of an amount equal to [at a minimum, the amount of the Factfinder's fee.]

THE FOLLOWING PARAGRAPHS MAY BE INSERTED IF DESIRED BY THE PARTIES.

8. [All parties agree not to withhold relevant information. If a party believes it cannot or should not release such information, it will state that certain information is being withheld and will provide the substance of the withheld information in some form (such as by aggregating data, by deleting non-relevant confidential information, by providing summaries, or by furnishing it to a neutral consultant to use or abstract) or a general description of it, and the reason for not providing it directly. Nothing in this paragraph imposes liability against the United States to disclose information, when such information is not releasable pursuant to statute, regulation, or the reasonable discretion of an appropriate official.

9. [Parties will provide information called for by this paragraph as much in advance of the Factfinding process as possible.]

10. Press.

[NOTE: THIS PARAGRAPH IS OPTIONAL. ALSO, CONSIDER THE OBLIGATION OF THE UNITED STATES TO ALLOW PUBLIC ACCESS TO CERTAIN INFORMATION.)

A.No party will discuss any matter relating to the Factfinding process except by the express written permission of all other parties to the Factfinding process.

11. Safeguards for the Parties.

A. All participants in the Factfinding process agree to act in good faith in all aspects of the process. Specified offers, positions, or statements made during the process may not be raised by other parties for any other purpose or as a basis for pending or future litigation. Personal attacks and prejudiced statements are unacceptable.

B. The participants may discontinue the Factfinding process at any time if they deem the process not productive. The withdrawal of one or more participants does [or does not] end the Factfinding process as to all other participants. Withdrawing parties remain bound by the provisions in this Protocol Agreement, particularly those regarding public comment and confidentiality.

C.This Protocol Agreement shall be effective upon the signatures of the representatives.

DATED: DATED:
BY: _____
Principal Representative for the United States

DATED: _____
BY: _____
Principal Representative for XYZ Corp.

DATED: _____
BY: _____
Neutral Factfinder

ARBITRATION PROTOCOL AGREEMENT BETWEEN
THE UNITED STATES OF AMERICA
AND

_____

This Arbitration Protocol Agreement (the "Protocol Agreement) dated this _____ day of _____19__, is executed by NAME , TITLE ,. on behalf of the United States of America (the "United States"), and by NAME , on behalf of NAME ("XYZ Corp.").

RECITALS

1.The United States and XYZ Corp are currently engaged in litigation [or are about to engage in litigation] in the United States District Court for _____

2. The United States and XYZ Corp have agreed to seek a resolution of NAME OF CASE Docket No. ____ through the use of arbitration.

3.This Protocol Agreement is intended to set forth the conditions under which the parties will conduct arbitration, thereby avoiding future disputes and disagreements.

AGREEMENT

NOW, THEREFORE, subject to the terms and conditions of this Agreement, the parties mutually agree as follows:

1. Participants in the Arbitration Process.
   A.Interests represented: Any party to the case may be represented in the arbitration process.
   B.Additional Parties: After the arbitration process has begun, additional parties may join the process only with the concurrence of all parties already represented.
2. AAA Commercial Arbitration Rules to be Applicable.[OTHER PUBLISHED RULES MAY BE USED BY THE PARTIES. THE AAA RULES HAVE BEEN SUGGESTED BECAUSE THEY ARE THE BEST KNOWN OF THE ARBITRATION RULES].
   A.The American Arbitration Association ("AAA")Commercial Arbitration Rules (most recent edition) are to govern this arbitration.
   B.Any of the AAA Commercial Arbitration Rules which the parties do not wish to govern this arbitration are set forth as follows: [THERE INDICATE BY SPECIFIC RULE NUMBER ANY RULES WHICH WILL NOT APPLY]
   C.Any additional rules or conditions (not set forth in the AAA Commercial Arbitration Rules) which the parties wish to govern this arbitration are set forth as follows: _____ [HERE INDICATE ANY RULES OR CONDITIONS NOT FOUND IN THE AAA RULES WHICH THE PARTIES WISH TO GOVERN THIS ARBITRATION]
3. Non-Binding nature of the Arbitration.
   A.It is agreed by both parties that the Arbitrator'sAward is non-binding and that no party may take any action,judicial or administrative, to seek to enforce this Award.

   B. Following issuance of the Arbitration Award, either party may declare within 30 days that it elects to be bound by the award. If the other party also so elects to be bound (within 30 days from the election by the first party), then the award will be treated as a binding Arbitration Award. [THE ARBITRATION AWARD PROCESS USED IN THE ADMINISTRATIVE DISPUTE RESOLUTION ACT OF 1996, AT 5 U.S.C. SS 590, PUB. L. 101-552 (NOV. 15, 1990) MAY BE USED BY AGREEMENT OF THE PARTIES AS AN ALTERNATIVE TO THE ABOVE AWARD PROCESS].

DATED: DATED:

BY:
Principal Representative for
the United States

DATED:
Principal Representative
for XYZ Corp.

FINANCIAL AGREEMENT BETWEEN THE UNITED STATES OF AMERICA
AND
_____

This financial agreement (the "Agreement"), dated this ____ day of _____ ___
19 _ , is executed by ___Name_____ _____, on behalf of the United States of America (the "United States"), and by _____, on behalf of _____("The other parties").

RECITALS

1.The United States and ____the other parties_____ are currently engaged in a dispute [or are seeking to avoid a dispute] involving an administrative program administered by the Bureau of Land Management.

2.The United States and _____the parties_____ have agreed to seek a resolution of case or issue _____ through the use of an alternative dispute resolution ("ADR") technique.

3.This Agreement is intended to avoid disputes and to record all agreements concerning financial matters involved in the use of this ADR technique.

(2)

AGREEMENT

NOW, THEREFORE, subject to the terms and conditions of this Agreement, the parties mutually agree as follows:

IF NO COSTS ARE EXPECTED BY USING THE ADR TECHNIQUE, AS, FOR EXAMPLE, WHERE THE GOVERNMENT PROVIDES A MEDIATOR FROM ANOTHER AGENCY:

1. The United States and _____the parties_____ agree that the use of the selected ADR technique will be without cost to either party. Each party agrees that no claim will be made against the other party for any costs associated with the selected ADR technique, including, but not limited to, the cost of any "neutral," his/her expenses, or associated costs, any litigation costs such as attorney fees, expert witness or fact witness fees, transcript costs, or any other costs associated with the ADR technique.

IF THE UNITED STATES INTENDS TO PAY FOR CERTAIN COSTS ASSOCIATED WITH THE USE OF THE ADR TECHNIQUE.
(THIS PARAGRAPH MUST BE EDITED TO REFLECT THE ACTUAL COSTS WHICH THE UNITED STATES AGREES TO PAY.)

1. The United States and ___the parties_____ agree that certain costs associated with the selected ADR technique will be paid by the parties as follows:

A. Each party will pay one-half the fee charged by the "neutral." Such fee is estimated to be $_____ per hour/day.

(3)

B. Each party will pay one-half the expenses incurred by the "neutral" Such expenses are estimated to be $ _____

C.Each party will pay its own attorney fees, expenses, witness fees, and all other costs associated with the ADR technique.

2. Under no circumstances shall the liability of the United States for costs pursuant to this Agreement exceed $ _____ without the express written agreement of the United States. Absent such an agreement, any expense incurred in excess of this amount, whether such expense is incurred by the "neutral," his/her agents or employees, or ____the parties_____ , or its agents or employees, will be the responsibility of the "neutral" or XYZ Corp. The

United States will not be responsible for any costs or expenses pursuant to this Agreement which exceed the amount set forth above.

3. In agreeing to pay for costs and expenses associated with the selected ADR technique, as set forth above, the United States does so voluntarily and without coercion or constraint. Nothing in this Agreement should be construed as a waiver of sovereign immunity or an admission by the United States that ____ the parties __ Corp., any court, or any other entity can impose upon the United States any duty or requirement to pay any additional costs or expenses associated with this ADR techniques, or the costs and expenses of any other ADR technique. _____ the parties _____ and _____, Neutral, specifically acknowledge and accept the statements set forth in this paragraph.

4. The United States and _____ the parties _____ agree that, should any disputes arise under this agreement, they will endeavor to resolve such disputes amicably and in good faith.

DATED: _____
BY: _____
Principal Representative for
the United States

DATED: _____
BY : _____
Principal Representative for
__ the other parties _____

DATED : _____
BY : _____
Neutral